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IN THE

Supreme Court of the United States

October Term, 1963.

No. 250

SAMUEL WILLIAM YORTY and FRANK G. BONELLI,
Appellants,

vs.

FRANK M. JORDAN, Secretary of State,
Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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Appellants,

vs.

FRANK M. JORDAN, Secretary of State,
Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of California entered on March 6, 1964. The judgment took the form of an order denying appellants' petition for writ of mandate which was filed for the purpose of attacking the validity of the California constitutional and statutory law governing the establishment of state senate districts. The ground for the attack is that the California law denies rights guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

This statement is filed to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented. In *Reynolds v. Sim*, ... U. S. ..... and related cases de-

cided on June 15, 1964, this Court took jurisdiction of and decided substantially identical questions arising from other states.

Opinion Below.

No opinion was filed by the California Supreme Court. The appellants' petition for writ of mandate was denied without a hearing by an order filed on March 4, 1964. [Record, Order dated March 4, 1964.] Appellants filed a petition for rehearing [Record, Pet. for Rehrng. pp. 1-13], and this too was denied by an order filed on April 29, 1964, again without opinion. [Record, Orders dated March 25 and April, 29, 1964.]

Jurisdiction.

(i) The proceeding was commenced by filing a petition for writ of mandate with the California Supreme Court pursuant to its authority to take original jurisdiction in such matters. (Calif. Constit., Art. VI, Sec. 4; California Rules of Court, Title One, Chapter 2, Rule 56.)

The purpose of the proceeding was to command the appellee, Frank M. Jordan, Secretary of State of California, who is the chief officer of the State having statewide functions respecting the election of state senators, to refrain from performing any of his said duties with respect to the election of a state senator in any senate district established by the 1961 senate districting statute (Calif. Stats. 1961, ch. 1235, pp. 2983 and 879; Calif. Elections Code, Sec. 30100) and Sec. 6 of Article IV of the California Constitution as amended in 1926 and 1942 (Appendix A, attached hereto); and to command that he perform said duties only with respect to such elections in districts established

by laws which conform to the requirements of Section 1 of the Fourteenth Amendment of the United States Constitution and the California Constitution as it existed prior to the amendment of Section 6 of Article IV in 1926.

(ii) The date of the judgment sought to be reviewed is March 4, 1964, being the date the order denying the appellants' petition for writ of mandate was filed, and likewise being the date of its entry. A petition for rehearing was filed, and the order denying such petition was filed on April 29, 1964. A notice of appeal from said judgment was filed in the Supreme Court of California on May 27, 1964. [Record, Notice of Appeal, pp. 1-4.]

(iii) The statute believed to sustain appellate jurisdiction is 28 U. S. C. 1257(2).

(iv) The following cases are believed to sustain the jurisdiction of this court:

It is immaterial that the state enactment in question is a statute or constitutional amendment, or that it was enacted by a legislature or by the people. *King Manufacturing Co. v. Augusta*, 277 U. S. 100, 103-104, 72 L. Ed. 801, 805-806; *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716, 717; *Scholle v. Hare*, 369 U. S. 429, 8 L. Ed. 2d 1; *Lucas v. The Forty-Fourth General Assembly of the State of Colorado*, ... U. S. ...., 32 Law Week, 4557; *Reynolds v. Sim*, ... U. S. ..... 32 Law Week 4535.

It is not necessary that the decision of the state court, in direct terms, be against the claim of invalidity. It is enough if the necessary effect of the judgment is to deny the claim of invalidity. *People ex rel. Bryant*

v. Zimmerman, 278 U. S. 63, 67, 73 L. Ed. 184; *Hammerstein v. Superior Court*, 340 U. S. 622, 95 L. Ed. 586; 341 U. S. 491, 95 L. Ed. 1135.

A denial of a petition for writ of mandate without opinion, is considered a final order under California law. *Steen v. Board of Civil Service Commissioners*, 26 Cal. 2d 716, 728, 160 P. 2d 816.

The text of Section 4 of Article VI of the California Constitution, as adopted in 1926 and amended in 1942, and the text of Sec. 30100, California Elections Code (Cal. Elec. Code, Ch. 2, Div. 16, as added by Calif. Stats. 1961, ch. 1235, Sec. 2) are of such length as to make it more convenient to set them forth in the Appendix attached hereto.

Questions Presented.

I.

Are the laws of California establishing senate districts so devoid of reasonableness or just relation or relevance to the elective process that they arbitrarily and capriciously create invidious discriminations against the suffrage rights possessed by voters dwelling in the heavily populated counties of the State, with the result that appellants and other voters residing within such counties are denied the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment?

(1) For the purposes of Section 1 of the Fourteenth Amendment, is a senate districting system reasonable or irrationally discriminatory which: (a) allows population discrepancies between districts as high as 422 to 1; (b) allows area discrepancies between districts as high as 477 to 1; or (c) follows no discernible rational pattern in establishing district lines to give representa-

tion to varying "interests" other than a rigid adherence to county boundaries established by or pursuant to state law, which county boundaries only occasionally or accidentally actually delimit "interests" acceptable as relevant to the elective process?

(2) May a senate districting system which makes use of factors other than population so subordinate population that: (a) 10.7% of the electorate can elect a majority of the Senate; (b) a population discrepancy as great as 422 to 1 exists between the largest and the smallest district; and (c) population discrepancies greater than 16 to 1 exist between the largest district and thirty of the remaining thirty-nine districts?

(3) Does a senate districting system which is otherwise invidiously discriminatory become reasonable and valid under Section 1 of the Fourteenth Amendment if it is adopted through the initiative process and the electorate persistently declines to approve subsequent amending initiative proposals?

(4) Does a senate districting system which is otherwise invidiously discriminatory become reasonable and valid under Section 1 of the Fourteenth Amendment because the lower house of the Legislature is so composed that the maximum population discrepancies between districts is only 4¼ to 1, and the discrepancies in only 30 of the 80 districts are more than 10% from the average or "ideal" population for an Assembly District?

(5) Does a senate districting system which is otherwise invidiously discriminatory become reasonable and valid under Section 1 of the Fourteenth Amendment because it is a "federal plan" through which no county may have more than one senate district and no more

than three counties of small population may be combined to form a senate district?

II.

In view of the great value attached to an individual's right of franchise, and in view of the fact that California law, contrary to fundamental ideas of democratic government, creates an unprecedentedly large debasement and dilution of the appellants' voting power as it pertains to the election of state senators, did the Supreme Court of California abuse its discretion and err by refusing to exercise its jurisdiction and in denying without opinion appellants' petition for writ of mandate?

Statement of the Case.

1. Summary of the History of the Organization of the California State Senate.

The 1849 and 1879 Constitutions of California each provided for a state senate organized primarily according to population.[1] Since 1879 the number of Senators has been fixed at forty, elected from districts.

As the result of growth of population at unequal rates in various areas of the State, Los Angeles County, within which appellants reside, was allotted three senatorial districts following the 1890 census, received five

[1]Art. IV, Sec. 29, Const. of 1849: "The number of senators and members of assembly shall, at the first session of the legislature holden after the enumerations herein provided for are made, be fixed by the legislature, and apportioned among the several counties and districts to be established by law according to the number of white inhabitants. . . ."

Art. IV, Sec. 6, Const. of 1879: ". . . and the legislature shall, at its first session after each census, adjust such districts and reapportion the representation so as to preserve them as near equal in population as may be. . . ." the full text is set forth as "Exhibit A", on page 17 of the Petition for Writ of Mandate [Record, Petition, p. 17].

following the 1900 census, and eight following the 1910 census. A combination of forces, deriving from the growth of urban areas at the expense of the rural, and the emergence of the south in general and Los Angeles County in particular as the most populous area in the State, produced a legislative deadlock following the 1920 census and no legislation reapportioning senate districts to reflect changes occurring in that decade was adopted.

In 1926 two initiative constitutional amendments relating to senate districting qualified for the November ballot. One, sponsored by interests associated with Los Angeles County, would have created a reapportionment commission to act in the event the Legislature failed to follow the constitutional mandate to reapportion. This initiative failed of adoption. The second, sponsored by the California Farm Bureau Federation and the San Francisco Chamber of Commerce, provided for a reapportionment commission and also for a senate districting system in which no county, however populous, could have more than one senate district, and no more than three counties, no matter how sparsely populated, could be combined into one senate district. This measure was approved by the voters.[2]

From the time that the 1926 initiative referred to was implemented,[3] Los Angeles County has been al-

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[2]The measure approved is set forth in the Appendix as Art. IV, Sec. 6 of the State Constitution. Except for substituting the State Controller in the place of the Surveyor General as a member of the Reapportionment Commission (1942), the text in the Appendix is unchanged from that adopted in 1926 (See Appendix A, this Jurisdictional Statement).

[3]Referendary proceedings following 1926 had the effect of delaying the operation of statutes enacted under the 1926 amendment of Art. IV, Sec. 6, until the commencement of the Legislative Session of 1931.

lotted a single senate district. In 1948, 1960 and again in 1962 initiative measures were qualified for the ballot for the purpose of providing, under differing formulae, but never on a strict population basis, a greater measure of representation in the state senate for the populous counties. Each of the three initiative proposals was defeated.

A petition for writ of mandate was filed in the Supreme Court of the State in December, 1962, by the appellants herein for the purpose of compelling the Reapportionment Commission to establish senate districts conforming to standards prescribed by the Constitution of 1879 prior to the 1926 amendment. A decision was rendered (*Lorty and Bonelli v. Anderson, et al.*, 60 Adv. Cal. 265, 33 Cal. Rptr. 97) denying relief on the ground that the Reapportionment Commission was without jurisdiction under the circumstances, but pointing out as follows:

> "The fact that this proceeding may not be maintained against the commission does not mean that petitioners are without a remedy to test the validity of the provisions for senatorial reapportionment set forth in [Article IV] section 6 [of the State Constitution]. The Secretary of State is the chief officer having statewide functions with respect to the election of state senators. In an appropriate proceeding against this officer such as mandamus . . . or declaratory relief . . . petitioners could obtain a determination as to the validity of section 6 and statutes adopted pursuant to it." (60 Adv. Cal. 270.)

The present proceeding (*Yorty and Bonelli v. Jordan*) was commenced on February 14, 1964, in reliance upon the passage quoted above by filing with the Supreme Court of California a petition for writ of mandate directing Appellee Jordan, as Secretary of State, to refrain from performing the functions of his office with respect to elections for members of the State Senate in any district created by statute pursuant to Article IV, Section 6 of the California Constitution, as amended in 1926. [Record, Petition for Writ of Mandate, *Yorty and Bonelli v. Jordan*, Sac. No. 7543, pp. 1-76, filed Feb. 14, 1964] In accordance with Court Rule 56 (See Appendix III), the respondent Jordan (appellee herein) filed points and authorities in opposition. [Record, Points and Authorities In Opposition, *Yorty and Bonelli v. Jordan*, Filed Feb. 26, 1964, pp. 1-16.] On March 4, 1964, an order was made and filed denying the petition for writ of mandate. [Record, Order, filed March 4, 1964.] A petition for rehearing was filed on March 13, 1964 [Record, Petition for Rehrng, pp. 1-13] and on March 26, 1964, an order was made and filed extending the time within which a petition for rehearing might be granted or denied until May 1, 1964. [Record, Order, filed March 25, 1964.] On April 29, 1964, an order was made and filed in which the petition for rehearing was denied. [Record, Order, filed April 29, 1964.]

The same fundamental problem involved in the present appeal is at issue in an action for declaratory relief brought by another party against the appellee Jordan, and others. (*Silver v. Jordan, et al.*, D. C. S. D. Cal. Civ. Action No. 62-953-MC.) A three-judge district court has been convened and facts have been stipulated to.

2. Facts Bearing Upon the "Reasonableness" or "Irrationality" of the California Senate Districting System.

The physical, economic and demographic diversity that exists in the State of California matches, if it does not exceed, that found in any other state. There are mountains and plains, wastelands and fertile lands, areas of water surplus, areas of aridity, centers of industry, finance and commerce, and centers of agriculture, mining and lumbering. There are great population centers and vast areas so sparsely settled as to be virtually uninhabited.

On top of this complex diversity is imposed a pattern of 58 counties, varying in size from the 45 square miles of the City and County of San Francisco to the 20,131 square miles of San Bernardino County, and varying in population (1960 census figures) from the 397 persons in Alpine County to the 6,038,771 persons who dwell in Los Angeles County.

While not challenging the right of a state, when establshing senate districts, to take into account such features of this diversity as may have actual and reasonable relevance to the elective process, it is the position of appellants that the California system, if it follows any plan at all, follows one of deliberate discrimination against the persons dwelling within the populous counties of the State, and that the degree of this discrimination is so great as to deprive persons dwelling within those populous counties of the equal protection of the laws. Certain examples will illustrate:

(a) It is said that the California senate districting system takes into account two factors—population and territory. The facts show that the largest district in area (San Bernardino County), with 503,591 popula-

tion, is 477 times the size of the smallest district in area (the City and County of San Francisco), which has 740,316 population. [Record, Petition, pp. 31, 32; Exs. F and G.] Yet each district has one senator. The facts show that the largest district in population (Los Angeles County, with 6,038,771 persons) has 422 times the population of the least populous (Inyo, Mono and Alpine Counties) which has but 14,196 persons. [Record, Petition, p. 30; Ex. E-3.] Yet, each has the same representation in the Senate—one.

Assuming that a "two-factor" system may be rationally applied, it has not been done so.

(b) It is said that the California system is designed to preserve control of the Senate in the rural agricultural producing areas of the State. If this is a permissible method for establishing senate districts, in California practice it is done in a highly unequal and irrational manner. The facts show that the formula took no account of the great agricultural and rural interests which exist within the heavily populated counties. For example, of the fifteen counties which in 1961 produced agricultural products worth in excess of $100,000,000 each, nine were among the fifteen most populous countries in the State [Record, Petition, Exs. J and D, pp. 43-44, 24-25]; further, Los Angeles and San Diego Counties, the two most populous, had a rural population in 1960 of 185,523, which is almost as great as the 192,829 rural population residing *in the 29 least populous countries combined.* [Record, Petition, Ex. J, pp. 43-44.] Los Angeles County has more acres in farms than any one of 27 other counties; San Diego County has more acres in farms than any one of 42 other counties. [Record, Petition, Ex. J, pp. 43-44.]

If, as assumed above, a deliberate weighting of rural interests at the expense of urban interests is a permissible method of establishing senate districts, it is clear that in actual practice only the rural interests in sparsely settled counties were given the extra weight, and the rural interests in the heavily settled counties were ignored. Such discrimination is unsupported by any rationally acceptable explanation.

(c) The degree of discrimination against the voting power of persons residing within the populous counties is further illustrated by examining the voting procedures of the State Senate. It is composed of 40 members. Most actions taken by the Senate require a majority of 21 votes for adoption.[4] Other measures, however, require at least a 2/3 vote (27 Senators) for adoption.[4] Thus, it is possible for twenty senators, whose districts have less than 10% of the population, to block passage of a bill requiring a majority vote [Record, Petition, Ex. G, p. 32]; and fourteen Senators representing districts with slightly more than 5% of the population have power to block passage of a measure requiring a 2/3 vote. [Record, Petition, Ex. G, p. 32.] Senators representing the twenty-one least populous districts (10.7% of the population) have the power to adopt a measure requiring a majority vote over the opposition of nineteen Senators representing over 89% of the people; and Senators representing the 27 least populous

[4]The following are some of the kinds of actions for which the California Constitution require a 2/3 vote: urgency measures for the preservation of public peace, health or safety, Art. IV, Sec. 1; override a veto, Art. IV, Sec. 16; propose an amendment to the Constitution, Art. XVIII, Sec. 1; adopt a statute to authorize issuance of general obligation bonds, Art. XVI, Sec. 1; appropriation from the general fund other than for support of the public school system, Art. IV, Sec. 34a.

districts (less than 20% of the population) can adopt a measure requiring a 2/3 vote over the objection of the Senators representing more than 80% of the population. [Record, Petition, Ex. G, p. 32.]

(d) The degree of discrimination against the voting power of persons residing in the populous counties is also illustrated by the relative amounts of financial interest in state legislation possessed by the residents of the several counties and senate districts. Exhibits H and I to the petition for writ of mandate [Record, Petition pp. 33-42] show totals of selected state tax collections from counties and senate districts, and total state subventions to the areas of collection. The difference, called "net state taxes paid", is expressed as a dollar figure, with the following results: Senators from the 27 least populous districts, whose population pay 8.1% of the "net state taxes", have the voting power to adopt an appropriation from the general fund against the opposition of the remaining 13 Senators whose population pays 91.9% of the "net state taxes". Senators from the 20 least populous districts whose population pay 2.3% of the "net state taxes" have the voting power to block adoption of a measure requiring a majority vote which is desired by the remaining Senators whose constituents pay 97.7% of the "net state taxes".

3. The Composition of the State Assembly.

The point is argued from time to time that where one house of a bicameral legislature is organized according to population, the requirements of the Fourteenth Amendment do not forbid organization of the second house on another basis. However valid this argument may be on a given state of facts, it is not available in California where constitutional provisions controlling

the formation of assembly districts operate to make it virtually impossible to achieve substantially equal populations in the 80 assembly districts. California assembly districts vary from the smallest, with a population of 72,105 in Imperial County, to the largest with a population of 306,191 in the neighboring Riverside County. 30 districts vary more than 10% from the "ideal" or "average" of 196,465; 24 of them vary more than 15%. [Record, Petition, pp. 59-61.]

4. How the Federal Question Is Presented.

In the petition for writ of mandate filed with the California Supreme Court, the basic contention was that the provisions of California law establishing senate districts deprived appellants and all persons similarly situated of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment. Reference was made to and reliance placed upon this federally protected constitutional right in several places in the petition, of which the following from the Record, Petition, page 9, is typical:

> ". . . The effect of the quoted portion of Section 6 of Article IV and the effect of Chapter 1235 of the Statutes of 1961 and Chapter 397 of the Statutes of 1951 is to discriminate invidiously against petitioners and all persons similarly situated and to deprive them of the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Article of Amendment of the United States Constitution."

An additional federal question was presented in the petition for rehearing [Record, Pet. for Rehrng. pp. 2, 10-12] by reference to the decisions of the Supreme Court of the United States holding that it is the duty

of a state, including a state court; when faced with a situation where equal protection is being denied, to provide that protection for one person as soon as it is provided for all, and that in cases involving civil rights, including the right to vote, a refusal to hear, or a dismissal, amounts to error.

Wesberry v. Sanders, 376 U. S. 1, 84 S. Ct. 526, 528, 529, 530;

Watson v. City of Memphis, 373 U. S. 526, 533;

State of Florida v. Board of Control, 350 U. S. 413;

Sweatt v. Painter, 339 U. S. 629, 635;

Sipuel v. Board of Regents, 332 U. S. 631, 632.

The Questions Are Substantial.

This appeal concerns the central right of all men who live in a democratic society—the right to vote. More particularly, it concerns the derivative and co-equal right of a citizen to cast votes having equal weight and influence as those cast by other citizens; for, to the extent that the strength of one man's vote is diluted in the counting, to that same extent his very right to vote is itself effectively denied. As stated in *Wesberry v. Sanders*, 376 U. S. 1, 8, 84 S. Ct. 526, 530:

"'. . . To say that a vote is worth more in one district that in another would . . . run counter to our fundamental ideas of democratic government. . . .'"

The importance of the issue presented in this case differs from the state legislative apportionment cases already decided by this Court in one and only one major particular: While the integrity of one person's vote in

California is inherently no more important that the integrity of another's living in a different state, the degree of the erosion, the sharpness of the injustice found in California exceeds all others. In no reported case, including all of those decided on June 15, 1964, and those decided on June 22, 1964, can facts be found which approach the degree of discrimination found in California; in no reported case which acknowledges jurisdiction to decide such a controversy is there a decision expressing approval on Fourteenth Amendment grounds of discrepancies of the magnitude found in California. If there was a need for plenary consideration of the cases arising from other states, it follows that the need for plenary consideration in the present case is proportionately greater.

Because of the recent and exhaustive treatment so recently given to the very problems presented in this appeal, and in the interests of brevity, it is regarded as unnecessary at this time to present anything more than a citation of the authorities which are now considered controlling on all issues presented. These authorities are:

Reynolds v. Sims, ... U. S. ....., 32 Law Week 4535;

WMCA, Inc. v. Lomenzo, ... U. S. ....., 32 Law Week 4551;

Lucas v. The Forty-Fourth General Assembly of the State of Colorado, ... U. S. ....., 32 Law Week 4557;

The Maryland Committee For Fair Representation v. Tawes, ... U. S. ....., 32 Law Week 4573;

Davis v. Mann, ... U. S. ....., 32 Law Week 4579;

Roman v. Sincock, U. S. ....., 32 Law Week 4583.

Under these authorities, it is now clear, as contended by appellants at all stages of the present and antecedent litigation [Record, Petition, pp. 55-76], that the present constitutional and statutory law governing the establishment of State senate districts in California deprives appellants and others similarly situated in the populous counties of the State of the equal protection of the laws, contrary to the requirements of Section 1 of the Fourteenth Amendment of the United States Constitution.

Conclusion.

For the reasons set forth, this Court has jurisdiction of the appeal, and it is submitted that the questions presented are substantial. Probable cause should be noted and the appeal should be set down for briefing and oral argument on the merits. The matter is no less important than the cases already decided, and the refusal of the highest court in the State to grant relief, even to the extent of taking jurisdiction, leaves appellants with no practicable avenue of redress other than appeal to this Honorable Court.

Respectfully submitted,

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APPENDIX A.

Text of Statutes Involved.

I.

Section 6 of Article IV of the California Constitution, as adopted in 1926 and amended in 1942:

"Section 6. For the purpose of choosing Members of the Legislature, the State shall be divided into forty senatorial and eighty assembly districts to be called senatorial and assembly districts. Such districts shall be composed of contiguous territory, and assembly districts shall be as nearly equal in population as may be. Each senatorial district shall choose one Senator and each assembly district shall choose one Member of Assembly. The senatorial districts shall be numbered from one to forty, inclusive, in numerical order, and the assembly districts shall be numbered from one to eighty in the same order, commencing at the northern boundary of the State and ending at the southern boundary thereof. In the formation of assembly districts no county, or city and county, shall be divided, unless it contains sufficient population within itself to form two or more districts, and in the formation of senatorial districts no county, or city and county, shall be divided, nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any assembly or senatorial district. The census taken under the direction of the Congress of the United States in the year one thousand nine hundred and twenty, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its

first regular session following the adoption of this section and thereafter at the first regular session following each decennial federal census, adjust such districts, and reapportion the representation so as to preserve the assembly districts as nearly equal in population as may be; but in the formation of senatorial districts no county or city and county shall contain more than one senatorial district, and the counties of small population shall be grouped in districts of not to exceed three counties in any one senatorial district; provided, however, that should the Legislature at the first regular session following the adoption of this section or at the first regular session following any decennial federal census fail to reapportion the assembly and senatorial district, a Reapportionment Commission, which is hereby created, consisting of the Lieutenant Governor, who shall be chairman, and the Attorney General, State Controller, Secretary of State and State Superintendent of Public Instruction, shall forthwith apportion such districts in accordance with the provisions of this section and such apportionment of said districts shall be immediately effective the same as if the act of said Reapportionment Commission were an act of the Legislature, subject, however, to the same provision of referendum as apply to the acts of the Legislature.

Each subsequent reapportionment shall carry out these provisions and shall be based upon the last preceding federal census. But in making such adjustments no persons who are not eligible to become citizens of the United States, under the naturalization laws, shall be counted as forming a

part of the population of any district. Until such districting as herein provided for shall be made, Senators and Assemblymen shall be elected by the districts according to the apportionment now provided for by law."

II

California Elections Code, Sec. 30100 (Calif. Stats., 1961, Ch. 1235, Sec. 2).

"CHAPTER 2

"SENATORIAL DISTRICTS

"Chapter 2, added by Stats. 1961, c. 1235, p. 2983 and 879 §2.

"§30100. *Senatorial districts; designation and boundaries*

"The State is divided into 40 Senatorial districts, which shall be designated and constituted as follows:

"1. The Counties of Modoc, Lassen and Plumas shall constitute the First Senatorial District.

"2. The Counties of Del Norte and Siskiyou shall constitute the Second Senatorial District.

"3. The County of Humboldt shall constitute the Third Senatorial District.

"4. The Counties of Mendocino and Lake shall constitute the Fourth Senatorial District.

"5. The Counties of Trinity and Shasta shall constitute the Fifth Senatorial District.

"6. The County of Butte shall constitute the Sixth Senatorial District.

"7. The Counties of Sierra, Nevada and Placer shall constitute the Seventh Senatorial District.

"8. The Counties of Tehama, Glenn and Colusa shall constitute the Eighth Senatorial District.

"9. The Counties of Eldorado and Amador shall constitute the Ninth Senatorial District.

"10. The Counties of Yuba and Sutter shall constitute the 10th Senatorial District.

"11. The Counties of Napa and Yolo shall constitute the 11th Senatorial District.

"12. The County of Sonoma shall constitute the 12th Senatorial District.

"13. The County of Marin shall constitute the 13th Senatorial District.

"14. The City and County of San Francisco shall constitute the 14th Senatorial District.

"15. The County of Solano shall constitute the 15th Senatorial District.

"16. The County of Alameda shall constitute the 16th Senatorial District.

"17. The County of Contra Costa shall constitute the 17th Senatorial District.

"18. The County of Santa Clara shall constitute the 18th Senatorial District.

"19. The County of Sacramento shall constitute the 19th Senatorial District.

"20. The County of San Joaquin shall constitute the 20th Senatorial District.

"21. The County of San Mateo shall constitute the 21st Senatorial District.

"22. The County of Stanislaus shall constitute the 22nd Senatorial District.

"23. The Counties of Santa Cruz and San Benito shall constitute the 23d Senatorial District.

"24. The Counties of Merced and Madera shall constitute the 24th Senatorial District.

"25. The County of Monterey shall constitute the 25th Senatorial District.

"26. The Countjes of Tuolumne, Mariposa and Calaveras shall constitute the 26th Senatorial District.

"27. The County of Kings shall constitute the 27th Senatorial District.

"28. The Counties of Alpine, Mono and Inyo shall constitute the 28th Senatorial District.

"29. The County of San Luis Obispo shall constitute the 29th Senatorial District.

"30. The County of Fresno shall constitute the 30th Senatorial District.

"31. The County of Santa Barbara shall constitute the 31st Senatorial District.

"32. The County of Tulare shall constitute the 32d Senatorial District.

"33. The County of Ventura shall constitute the 33d Senatorial District.

"34. The County of Kern shall constitute the 34th Senatorial District.

"35. The County of Orange shall constitute the 35th Senatorial District.

"36. The County of San Bernardino shall constitute the 36th Senatorial District.

"37. The County of Riverside shall constitute the 37th Senatorial District.

"38. The County of Los Angeles shall constitute the 38th Senatorial District."

"39. The County of Imperial shall constitute the 39th Senatorial District.

"40. The County of San Diego shall constitute the 40th Senatorial District."

III

California Rules of Court, Title One, Chapter 2, Rule 56:

RULE 56. ORIGINAL PROCEEDINGS

"(*a*) [*Form and content of petition*] A petition to a reviewing court for a writ of mandate, certiorari, or prohibition, or for any other writ within its original jurisdiction, must be verified and shall set forth the matters required by law to support the petition, and also the following: (1) If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court; and (2) if any judge, court board, or other officer or tribunal in the discharge of duties of a public character be named therein as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding.

"(*b*) [*Points and authorities and service*] A petition for the issuance of such a writ shall be accompanied by points and authorities and by proof of service of both on the respondent and any real party in interest named in the petition. Within five days after such service and filing the respondent or any real party in interest or both, separately

or jointly, may serve and file points and authorities in opposition; provided, however, that the court in its discretion (1) may allow the filing of the petition without service, and (2) may act on the petition without requiring the prior filing of opposition.

"(c) [*Return*] If the petition is granted with or without prior service or opposition, and a writ or order to show cause issues, the respondent or real party in interest or both, separately or jointly may make a return, by demurrer, verified answer or both. Unless a different return date is specified by the court, the return shall be made at least five days before the date set for hearing. If the return is by demurrer alone, and the demurrer is not sustained, the peremptory writ may issue without leave to answer.

"(d) [*Proceedings not covered by this rule*] The provisions of this rule shall not apply to applications for writ of habeas corpus, or to petitions for review pursuant to rules 57, 58 and 59."

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IN THE

Supreme Court of the United States

October Term, 1964
No. 250

SAMUEL WILLIAM YORTY and FRANK G. BONELLI,
Appellants,

vs.

FRANK M. JORDAN, Secretary of State,
Appellee.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

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IN THE

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October Term, 1964
No. 250

SAMUEL WILLIAM YORTY and FRANK G. BONELLI,
Appellants,

vs.

FRANK M. JORDAN, Secretary of State,
Appellee.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

Appellee, Secretary of State, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the judgment of the California Supreme Court be dismissed on the ground that the judgment rests on an adequate and independent non-federal basis, and not on a substantial federal question.

PRELIMINARY STATEMENT.

This case should be considered in relation to other litigation with respect to reapportionment of the California Legislature since *Baker v. Carr*, 369 U.S. 186 (1962). Two facts are important: First, no state or federal court has yet had occasion to reach the ultimate merits of the federal constitutional issue relating to the

California Legislature. Second, two cases are now pending, one in the United States District Court for the Southern District of California, and one in the Supreme Court of California, either of which may reach the merits.

The latter is a subsequent suit brought by these appellants against this respondent substantially identical in all respects to that in which they here seek to appeal, except that this Court's historic reapportionment decisions of June 15, 1964, were handed down four days before it was filed. That later suit presents the first opportunity for any court of the State of California to act on the constitutional issues relating to apportionment of the California Legislature since the historic June 15 decisions. Any action of this Court in the earlier case from which appellants here seek to appeal, other than dismissal of the appeal, would not expedite but might interfere with the orderly disposition of the two cases in which the constitutional issues are before the California Supreme Court and the United States District Court in California.

These are the cases in California since *Baker v. Carr, supra*, and their present status:

1. *Silver v. Jordan*, Los Angeles Superior Court No. 794987, a class suit against the California Secretary of State, seeking declaratory and injunctive relief to compel reapportionment of the California Senate. Suit was filed April 30, 1962, and voluntarily dismissed by plaintiff prior to any action or hearing on the merits, on September 17, 1962.

2. *Silver v. Jordan, et al.*, United States District Court, Civil Action No. 62-953-MC, a class suit filed

July 16, 1962 against the California Secretary of State and other defendants, including the Governor and Attorney General, which also seeks declaratory and injunctive relief to compel reapportionment of the California Senate. A further hearing on the merits in this case, the first since December 17, 1962, is set for September 3, 1964.

3. *Yorty and Bonelli v. Anderson, et al.*, 60 Adv. Cal. 265, 384 P.2d 417, a petition for writ of mandate filed December 28, 1962, to compel the Reapportionment Commission of California to reapportion the Senate. The case was decided on the ground that the reapportionment commission lacks jurisdiction to act, the court declaring that suit might be brought against the Secretary of State. Judgment became final on September 19, 1963.

4. The present suit, *Yorty and Bonelli v. Jordan*, Sac. No. 7543, which was not brought until February 14, 1964, after commencement of the primary election procedures which are an integral part of the process by which members of the California Legislature are elected.

5. *Yorty and Bonelli v. Jordan*, Sac. No. 7582, a subsequent petition for writ of mandate by these same appellants against the Secretary of State, substantially identical to the petition initiating the suit in which appellants seek to appeal to this Court. This new suit was filed in the California Supreme Court on June 19, 1964, approximately three weeks after appellants filed notice of appeal to this Court in the present case, but prior to filing their Jurisdictional Statement in this Court on July 6, 1964.

The petition filed on June 19, 1964, and appellee's response to that petition, are incorporated as Appendix A (p. A1 *et seq., infra*) and Appendix B (p. B1 *et seq., infra*), to this motion. In that response appellee quoted (pp. B 3-4, *infra*), the following passages of this Court's opinion in *Reynolds v. Sims*, 84 Sup. Ct. 1362 (1964):

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state." (84 Sup. Ct. at 1385)
>
> * * * *
>
> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." (84 Sup. Ct. at 1389)

Appellee then said (p. B 4, *infra*):

> "Three things are now clear: (1) The United States Supreme Court's construction of the Equal

Protection Clause requires action with respect to the apportionment of the California Legislature; (2) wide choices are available within the standards announced by the Court, which choices should be made in the first instance by the Legislature rather than by any court; (3) interference with the 1964 election, candidates for which were nominated on June 2, 1964, is neither required nor practical."

Appellee adheres to that position in this Court. We seek a disposition of this appeal which will facilitate the objectives there stated to the California Supreme Court.

STATEMENT OF THE CASE.

Appellants commenced proceedings in this matter on February 14, 1964, by filing an original petition for writ of mandate in the California Supreme Court. The petition alleged that the formula for apportioning the State Senate prescribed by the 1926 Amendment to section 6 of article IV of the California Constitution, and the senate districts created by chapter 1235 of the Statutes of 1961 (Cal. Elec. Code § 30100), pursuant to that formula, deny appellants equal protection of the laws afforded by the Fourteenth Amendment to the United States Constitution.

Appellants prayed for an order directing appellee to refrain from performing the duties of his office with respect to any election for member of the State Senate held within a district created by chapter 1235 of the Statutes of 1961, and that he be further commanded to perform the duties of his office relating to the election of members of the State Senate from districts created by the superseded chapter 37, Statutes of 1911,

Extra Session, until the Legislature adopts a new senate districting statute conforming to the requirements of the California Constitution prior to its amendment in 1926, and of the United States Constitution. The districts created by chapter 37, Statutes of 1911 were, according to appellants, also invidiously discriminatory.

On February 20, 1964, pursuant to Rule 56(b) of the California Rules of Court,[1] appellee filed points and authorities in opposition to the granting of an alternative writ of mandate. The California Supreme Court denied the petition on March 4, 1964, without opinion, and denied a petition for rehearing also without opinion on April 29, 1964.

Appellee argued in his points and authorities only that the California Supreme Court should dismiss the petition without considering its merits, and without prejudice to appellants' right to commence similar proceedings after the 1964 general election.

The California Supreme Court issued no alternative writ or order to show cause. Hence no pleading was filed by appellee, and no hearing was held by the court.

The California primary election was held on June 2, 1964. The general election will take place on November 3, 1964.

[1]Rule 56 of the California Rules of Court is quoted at pages 6 and 7 of Appendix A to appellants' Jurisdictional Statement.

ARGUMENT.

I

The California Supreme Court's Order of March 4, 1964, From Which Appellants Seek to Appeal, Was in All Likelihood Decided on One or More Grounds Unrelated to the Ultimate Federal Constitutional Issue.

The California Supreme Court's order from which this appeal is taken might be based on one or more of the following grounds, unrelated to the ultimate constitutional issue:

(1) Issuance of the writ of mandate would disrupt the 1964 primary and general election process which had already commenced. Appellee's argument on this point is found in appellee's Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate at pages 3-11.[2]

(2) Because they delayed nearly six months (from September 19, 1963 to February 14, 1964) after the disposition of their prior petition in the California Supreme Court, appellants are barred by equitable considerations from pressing for reapportionment in the midst of a pending election. Appellee's argument on this point is found in appellee's Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate at page 11.[3]

(3) A class action entitled *Silver v. Jordan, et al.*, United States District Court No. 62-953-MC, involving identical issues of constitutionality of the appor-

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[2]Appellee's Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate are part of the Record, but the pages of the Record are not numbered.

[3]*Ibid.*

tionment of the California Legislature, was pending (as it still is) in another court.[4] Appellee's argument on this point is found in appellee's Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate at pages 13-14.[5]

(4) Prior to June 15, 1964, when the United States Supreme Court decided six reapportionment cases on the merits, the California Supreme Court could not have rendered any decision based on more than a prediction of this Court's determination of constitutional standards. Appellee's argument on this point is found in appellee's Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate at pages 11-12.[6]

(5) An extraordinary writ seeking relief, which concededly fails (Record: Petition, pp. 12-13) to meet the constitutional standards asserted by appellants, should not be granted. Appellee's argument on this point is found in appellee's Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate at pages 7-9.[7]

(6) If a petition for an extraordinary writ compelling reapportionment of the California Senate were appropriate in any California court, that court is not the highest appellate court of California, since reapportioning the legislature involves complicated and dif-

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[4]See *Simmons v. Superior Court*, 96 Cal. App. 2d 1, 9, 214 P. 2d 844 (1950) and the cases therein cited for a discussion of the discretionary authority of a California court to stay an action until the conclusion of another action already pending in another jurisdiction. Also *cf. Gamble v. San Diego*, 79 Fed. 487 (C.C.S.D. Cal. 1897).

[5]See footnote 2.

[6]*Ibid.*

[7]*Ibid.*

ficult questions of fact inappropriate for an appellate tribunal.[8]

(7) No relief in any court is appropriate until after the California Legislature has an opportunity to act in the light of the United States Supreme Court decisions, which were expected, but had not been rendered, as of March 4, 1964. *Cf. Reynolds v. Sims*, 84 Sup. Ct. 1362, 1394 (1964).

None of the foregoing grounds presents a substantial federal question. A decision to deny the writ of mandate on any one of the foregoing grounds would be a decision on which the Supreme Court of California should have the last word, so long as the state affords a forum for determination of the federal constitutional issue when properly presented. That the State does afford such a forum has not been in doubt. It was made clear by the California Supreme Court's decision in *Yorty and Bonelli v. Anderson, et al.*, 60 Adv. Cal. 265, 384 P.2d 417 (1963).

There is no indication that the California Supreme Court decided any substantial federal question. There is every reason to believe that it did not. Argument was tendered on one substantial federal constitutional

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[8] In *Yorty and Bonelli v. Anderson*, 60 Adv. Cal. 265, 384 P. 2d 417, the California Supreme Court said: "The fact that this proceeding may not be maintained against the commission does not mean that petitioners are without a remedy to test the validity of the provisions for senatorial reapportionment set forth in [Article IV] section 6 [of the State Constitution]. The Secretary of State is the chief officer having statewide functions with respect to the election of state senators. In an appropriate proceeding against this officer such as mandamus . . . or declaratory relief . . . petitioners could obtain a determination as to the validity of section 6 and statutes adopted pursuant to it." (60 Adv. Cal. at 270, 384 P.2d at 420.) The California Supreme Court did not address itself to the question of which California court might most appropriately decide the issues.

issue—the constitutionality of the apportionment of the California legislature—but only by appellants. It is not quite conceivable that the California Supreme Court would have decided the constitutional merits—especially in the light of uncertainties last March 4—without briefs and argument on both sides, and an opinion.

II.

Because the Order Below Might Have Rested Upon an Adequate Non-Federal Ground Appellants Have Failed to Sustain Their Burden of Showing Affirmatively That It Rested on a Necessary Federal Ground.

The appellate jurisdiction of the United States Supreme Court does not extend to review a state court decision based upon an adequate and independent non-federal ground, even though a federal question has been raised and perhaps wrongly decided. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

Appellants must show affirmatively that the judgment of the California Supreme Court rested on a necessary federal ground. 28 U.S.C. § 1257; *Phyle v. Duffy*, 334 U.S. 431 (1948); *Honeyman v. Hanan*, 300 U.S. 14, 21 (1937); *Lynch v. New York*, 293 U.S. 52, 54-55 (1934). Appellants' burden of establishing jurisdiction is not met if "it appears that the judgment [below] *might* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

Where both federal and non-federal questions have been raised in the state court, but no opinion is delivered by the highest state court in rendering its judg-

ment, this Court must assume that the state court's decision was based upon a non-federal ground. *Stembridge v. Georgia, supra; Lynch v. New York, supra.* Nothing in the record of the present case rebuts this assumption. All factual inferences support it, and hence the appeal should be dismissed.

1. There Is No Affirmative Showing That the California Supreme Court Considered or Passed Upon the Merits of the Apportionment of the California Legislature.

Appellants have not shown that the California Supreme Court passed upon or even considered the only substantial federal question raised by appellants, to wit, the merits of their equal protection claim. The California Supreme Court refused to issue an alternative writ or order to show cause; it did not hold a hearing; it denied the petition without filing an opinion. Under established California law, summary denial of a petition for an original writ does not constitute a decision on the merits of the petition, and such denial is not res judicata in a subsequent proceeding. *Funeral Dir. Assn. v. Bd. of Funeral Dirs.*, 22 Cal. 2d 104, 107, 136 P.2d 785 (1943); *Confidential, Inc. v. Superior Court*, 157 Cal. App. 2d 75, 78, 330 P.2d 540 (1958). A denial is without prejudice to a new petition. *Funeral Dir. Assn. v. Bd. of Funeral Dirs., supra.*

The statements and acts of the appellants subsequent to the order of March 4, 1964, show that appellants do not regard that order as a determination of the merits of appellants' federal constitutional claims. Thus, the petition for rehearing which appellants filed in the California Supreme Court, and the Jurisdictional Statement which appellants filed in this Court, are each predicated upon the contention that the California Supreme

Court erred *by refusing to take and exercise its jurisdiction in this matter.* (Record: Petition for Rehearing, pp. 3, 4, 5, 10, 13; Juris. Stat., pp. 6, 17.)

The appellants are now seeking to litigate in the Supreme Court of California the very issues which they simultaneously ask this Court to "review". Assuming, arguendo, that this Court has jurisdiction, its only appropriate course would be to remand the case to the California Supreme Court. That is where appellants quite properly now are.

2. The Nature of the Original Jurisdiction of the California Supreme Court to Issue a Writ of Mandate Provides Strong Indication That Its Decision Was Based on an Adequate Non-Federal Ground.

In California, the supreme court, district courts of appeal, and superior courts possess concurrent jurisdiction to issue prerogative writs, including the writ of mandate. Issuance of a writ of mandate is within the discretion of the court to which the petition is addressed. The writ is not granted as a matter of strict legal right, but is based upon equitable considerations. *Sipper v. Urban*, 22 Cal. 2d 138, 137 P.2d 425 (1943); *Irvine v. Gibson*, 19 Cal. 2d 14, 118 P.2d 812 (1941); *Betty v. Superior Court*, 18 Cal. 2d 619, 116 P.2d 947 (1941); *Farrington v. Fairfield*, 194 Cal. App. 2d 237, 16 Cal. Rptr. 119 (1961); *Wallace v. Board of Education*, 63 Cal. App. 2d 611, 147 P.2d 8 (1944). When the granting of a writ is likely to result in public detriment, the court is warranted in denying it. *Ferenz v. Superior Court*, 53 Cal. App. 2d 639, 643, 128 P.2d 48 (1942). Furthermore, it is the policy of the California appellate courts to require that application be first made to a lower court, unless the appellate court

concludes that the circumstances are such as to render it proper that the writ should issue originally from a reviewing court. (Rule 56(a), California Rules of Court.)

Whether the Supreme Court of California should have exercised its discretionary jurisdiction over an application for an extraordinary writ in view of the circumstances of this case involved a decision of a non-federal nature. *Cf. Fullerton v. Texas*, 196 U.S. 192 (1905); *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951).

3. Disruption of the 1964 Election, in Progress Since January, Is Not Compelled Under the Reapportionment Decisions of June 15, 1964.

On June 15, 1964, this Court remanded *WMCA, Inc. v. Lomenzo*, 84 Sup. Ct. 1418, and *Lucas v. Forty-Fourth General Assembly of Colo.*, 84 Sup. Ct. 1472, to United States District Courts in New York and Colorado for determination whether relief should be granted prior to next November's election. That question, on that date, presented issues of fact then inappropriate for decision by this Court.

It is impossible for the following to occur before the November 1964 general election: assumption by this Court of jurisdiction and determination of the ultimate constitutional merits of appellants' claim; implementation of that decision by a court or the California Legislature; nomination of candidates under newly constituted procedures.[2] Although appellants claim to be en-

[2]Details of the California election procedure are described in the Record (Pts. 8 Attch. in Opp., pp. 3-7); and in appellee's response to appellants' Petition for Writ of Mandate of June 19, 1964 (pp. B 6-9, *infra*).

titled to immediate relief, their claim, insofar as it seeks the impossible, does not present a substantial federal question.

Appellee does not challenge the jurisdiction of the California court to act after the 1964 election, or to now assume and retain jurisdiction to be exercised only after the 1964 election. This Court has indicated the propriety of that course, and the propriety of the relief appellee suggests—a first opportunity for the legislature to exercise the choices which the Court has emphasized remain with the state, the exercise of which is not a normal judicial function. See *Reynolds v. Sims*, 84 Sup. Ct. 1362, 1394 (1964).

Although the California Supreme Court denied the petition herein, the effect thereof is the same as if the proceedings had been stayed; inasmuch as the order of denial did not constitute an adjudication of the merits of the petition.

CONCLUSION.

Appellee respectfully submits that his motion to dismiss should be granted. Adequate and independent non-federal questions were presented to the California Supreme Court. There is every reason to suppose that the order of the California Supreme Court is based on a non-federal ground. Even if there were doubt about this, the motion to dismiss should be granted, since a number of state grounds exist and appellants have the burden to show affirmatively that a necessary federal question was in fact decided. Nothing in the record sustains that burden.

Should this Court conclude, contrary to the position appellee urges here, that a necessary federal constitu-

tional question was decided by the California Supreme Court on March 4, 1964, its indicated course of action would be to reverse and remand to the California Supreme Court for consideration in the light of the reapportionment decisions of June 15, 1964. This Court should not attempt to interfere with the 1964 election. Exercise of jurisdiction by the California Supreme Court prior to the 1966 election is not opposed by appellee. Therefore, reversal of the California Supreme Court's decision of March 4, 1964, under these circumstances, would serve no useful purpose. On the other hand, reversal of this decision while the appellants' June 19, 1964 proceeding is before the California Supreme Court would cause confusion, and a possibility of delay.

Appellants elected, in their petition of June 19, 1964, to treat the matter as still before the California Supreme Court. They should not be heard to ask reversal of a decision which, by their conduct, they accurately admit the California Supreme Court has not made.

Respectfully submitted.

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APPENDIX A.

In the Supreme Court of the State of California

Sac. No. 7582. Filed June 19, 1964.

SAMUEL WILLIAM YORTY and FRANK G. BONELLI,
Petitioners,

vs.

FRANK M. JORDAN, Secretary of State,
Respondent.

PETITION FOR WRIT OF MANDATE.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the State of California:

This petition is, in major part, identical to the petition previously filed by Samuel William Yorty and Frank G. Bonelli (Sac. No. 7543) wherein a writ of mandate was sought against the respondent Frank M. Jordan, Secretary of State. Because the Supreme Court of the United States on June 15, 1964 has settled the law on the basic issues presented here, petitioners believe it appropriate to present the matter to this Honorable Court a second time.

Petitioners Samuel William Yorty and Frank G. Bonelli, by this, their verified petition, seek a Writ of Mandate commanding the respondent, Frank M. Jordan, Secretary of State, to refrain from performing any of the duties of Secretary of State with respect to any election for the office of Member of the State

Senate which is held within a Senate District established by Chapter 1235 of the Statutes of 1961, and to desist from any act in aid of such an election.

In compliance with subsection (a) of Rule 56 of the Rules on Appeal, petitioners state that in their opinion the writ should issue from this Honorable Court for the following reasons:

(a) The question is one of great importance. No questions of fact are presented. All material set forth in the Exhibits relied upon by the petition are either copies of public records, or compilations of information contained in public records. The only questions presented are questions of law which should be decided by the highest possible court at the earliest possible date.

(b) The public interest would be served by an early determination by a court of last resort. Petitioners contend that all persons presently holding certificates of election for unexpired terms as Members of the State Senate derive their authority through elections conducted in accordance with provisions of constitutional and statutory law which are unconstitutional and void by reason of being invidiously discriminatory against petitioners and all persons similarly situated and thereby depriving petitioners and said others of the equal protection of the laws. Where the legislative policy of the State of California is being established by an Assembly with concurring or dissenting action or inaction by a Senate composed only of *de facto* Senators, elected pursuant to unconstitutional laws, the public interest requires an early decision in order that Constitutional representative government be restored in the State of California.

Petitioners allege as follows:

I.

Petitioners are citizens, electors and taxpayers of the United States and of the State of California, residing in the County of Los Angeles, over the age of twenty-one years, and entitled to vote for members of the Legislature of the State of California. Petitioners bring this proceeding in behalf of themselves and in behalf of all other persons and voters of the State of California similarly situated.

II.

(a) The Constitution of the State of California, as adopted in 1879, provided in Section 6 of Article IV that "For the purpose of choosing members of the legislature, the state shall be divided into forty senatorial and eighty assembly districts, as nearly equal in population as may be . . .", with certain qualifications thereafter stated. Exhibit "A", referred to in the Appendix attached hereto and made a part hereof by reference, is a correct copy of the section referred to.

(b) The Legislature, pursuant to the direction contained in said Section 6 of Article IV, adjusted the said assembly and senatorial districts and reapportioned the representation after each decennial federal census except that no action was taken to adjust and reapportion after the decennial federal census of 1920 and the districts established in 1911, by amendment of Section 78 of the Political Code (Stats. 1911, Extra Session, Ch. 37, p. 140) remained in effect until said Section 78 was further amended in 1927 (Stats. 1927, Ch. 856, p. 1757), which said amendment, and each subsequent amendment adopted for the purpose of es-

tablishing Senate Districts, including Ch. 1235, Stats. 1961, is alleged by petitioners to be unconstitutional.

(c) Under redistricting statutes adopted pursuant to the provisions of said Section 6 of Article IV, and in recognition of the rapid growth and changes in distribution and concentration of population in the State of California, senatorial districts were established in the County of Los Angeles in the following numbers:

Following the federal decennial census of 1890—three;

Following the federal decennial census of 1900—five;

Following the federal decennial census of 1910—eight.

Subsequent to the redistricting statute of 1911, no changes were made in the number of Senators elected from districts located within Los Angeles County until the convening of the Legislature in 1931, at which time and from that time to the present, Los Angeles County was, and has been represented by one Senator.

III.

(a) At the general election held on Tuesday, November 2, 1926, the electors of the State of California adopted an initiative constitutional amendment amending Section 6 of Article IV of the Constitution. Exhibit "B" referred to in the appendix attached hereto and made a part hereof by reference is a correct copy of said amendment. The provisions of said section remain to this day the same as amended at said election of November 2, 1926, except for the fact that the words "Surveyor General" were stricken from the section and the words "State Controller" inserted in place

thereof as the result of a Constitutional amendment approved by the people at the general election held on November 3, 1942.

(b) The initiative constitutional amendment referred to appeared on the ballot for the general election of November 2, 1926, as Proposition 28. Exhibit "C" referred to in the appendix attached hereto and made a part hereof by reference is a correct copy of the ballot title and the arguments favoring and opposing the adoption of Proposition 28, which were distributed to the voters by the then Secretary of State.

(c) Following the adoption of the initiative constitutional amendment referred to, the Legislature, in 1927, enacted a redistricting statute which complied with the terms of Section 6 of Article IV as amended in 1926. Said redistricting statute was subjected to a referendum, approved, and Assemblymen and Senators elected from districts established in 1927 by the referended statute first took office in 1931. From that time until the present all of Los Angeles County has been a single Senatorial district and represented by a single State Senator.

(d) At the first regular session of the Legislature following the federal decennial census of 1930, 1940, 1950 and 1960 the Legislature adopted statutes fixing and adjusting legislative districts in conformance with the standards and requirements of Article IV, Section 6, of the Constitution, as amended in 1926 and in 1942. At the present time all persons holding certificates of election for unexpired terms as State Senators elected from even-numbered districts were elected from districts established at the 1961 regular session by Chapter 1235 of the Statutes of 1961; all persons holding

such certificates of election for unexpired terms as State Senators from odd-numbered districts were elected from districts established at the 1951 regular session by Chapter 397 of the Statutes of 1951.*

IV.

Exhibits "D", "E-1," "E-2," and "E-3" referred to in the appendix attached hereto and made a part hereof by reference are the following:

Exhibit "D"—An alphabetical list of the counties of California, showing the area and the populations of each county determined at the decennial census of 1920, 1930, 1940, 1950, and 1960.

Exhibit "E-1".—Table 1 of Appendix A of the Report of the State of California Study Commission On Senate Apportionment (Published February, 1962), showing an alphabetical listing of the counties of California with population figures for each for 1950 and 1960, and projected population figures for each of said counties, as determined by the State Department of Finance, for the years 1970 and 1980. Said Study Commission was that created by Chapter 607 of the Statutes of 1961.

Exhibit "E-2"—Table 2 of Appendix A of the Report of the Study Commission, showing the counties of California arranged in order of their 1960 population, with 1970 and 1980 projected populations for each of said counties.

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*While it is recognized that Ch. 397, Stats. 1961, was repealed by Ch. 1235, Stats. 1961, it seems that such statutes should be regarded as surviving for some purposes. *Sloane v. Donoghue*, 20 Cal. 2d 607. Inasmuch as State Senators from odd numbered districts were elected from districts established by Ch. 397, Stats. 1951, that statute is regarded in this petition as surviving for that limited purpose.

Exhibit "E-3"—Table 3 of Appendix A of the Report of the Study Commission, showing population of Senatorial districts created by statute in 1961 as determined by the 1960 census, and projected populations for the years 1970 and 1980 for the same areas.

Said Exhibits are true copies of what they purport to be. Such internal inconsistencies as may exist are in the originals, and of so minor a nature as not to be of significance relative to the issues in the within proceeding.

V.

Exhibits "F" and "G" referred to in the Appendix attached hereto and made a part hereof by reference are the following:

Exhibit "F"—A tabulation of the areas of the Senate Districts established in 1961, measured in square miles.

Exhibit "G"—A tabulation of the areas and populations of Senate Districts arranged first in descending order of size, and second in descending order of population, as per the 1960 census.

The content of Exhibits "F" and "G" are a compilation and computation derived from information contained in Exhibits "D", "E-1", "E-2" and "E-3".

VI.

Exhibits "H" and "I" referred to in the Appendix attached hereto and made a part hereof by reference are the following:

Exhibit "H"— copy of a letter, and four attached schedules, dated March 1, 1962, from A. Alan Post, Legislative Analyst, to Assemblyman Vernon Kilpatrick. Said letter and schedules were printed in the

March 8, 1962, issue of the Journal of the Assembly and may be found at pages 197 to 202 thereof. Said letter and schedules contain information segregated according to counties, as more particularly set forth therein, relative to State tax collections, State subventions, and property tax collections.

Exhibit "I"—A compilation of certain selected information contained in Exhibit "H", as follows: Column 1, "Senate Districts" arranged in ascending order according to total State Tax Collections from the county or counties comprising each district; Column 2, "Total State Tax Collections" from each Senate District; Column 3, "Total State Subventions" to each Senate District; Column 4, "Net State Taxes Paid", being the difference between total State taxes paid from a district (*i.e.*, column 1) and total State subventions to said district (*i.e.*, column 2); and Column 5, "Subventions as a Percent of Collections" for each district.

VII.

Exhibit "J" referred to in the Appendix attached hereto and made a part hereof by reference is a compilation of information pertaining to selected rural characteristics, as more particularly set forth therein, of each county in California, arranged in order of decreasing population. The source of the information is designated in the footnotes appended to this exhibit.

VIII.

The purpose and effect of that portion of Section 6 of Article IV of the Constitution which reads as follows:

"[I]n the formation of senatorial districts no county, or city & county, shall be divided . . .;

> but in the formation of senatorial districts no county or city and county shall contain more than one senatorial district, and the counties of small population shall be grouped in districts of not to exceed three counties in any one senatorial district;"

has been since its adoption in 1926, is now and will for the foreseeable future continue to be to debase and diminish the voting power and the right to vote of all citizens residing in the heavily populated counties of the State and said provision deprives such citizens of the power to cast votes for members of the State Senate which are equally effective with the votes cast by citizens residing in counties having smaller populations. The quoted provision of Section 6 of Article IV provides no reasonable standard for establishing the boundaries of senate districts, has no just relation or relevance to the electoral process, and creates inequalities between the residents of the several Senate districts which are so disparate relative to the said residents' actual differences, one from another, as to be wholly arbitrary and capricious. The effect of the quoted portion of Section 6 of Article IV and the effect of Chapter 1235 of the Statutes of 1961 and Chapter 397 of the Statutes of 1951 is to discriminate invidiously against petitioners and all persons similarly situated and to deny them equal suffrage in free and equal elections and to deprive them of the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Article of Amendment of the United States Constitution.

The provisions of Chapter 1235 of the Statutes of 1961 and of Chapter 397 of the Statutes of 1951, to

the extent that they establish Senate Districts in conformance with the quoted portion of Section 6, are unconstitutional and void, and all persons holding certificates of election for unexpired terms as State Senators elected from any district established under either of said statutes are *de facto* Senators only and hold no right to said offices or to exercise any of the powers of said offices.

IX.

Respondent is Secretary of State of California and is the chief officer having state-wide functions to perform with respect to the election of members of the State Senate. Petitioners are informed and believe, and on the basis of such information and belief allege:

(a) That respondent, in performing the duties required of him by law with respect to the election of members of the State Senate, will notify county clerks of offices for which candidates are to be nominated at primary elections (Elec. Code, Sec. 6462), receive declarations of candidacy and sponsor certificates (Elec. Code, Secs. 6519, 6521, 6550, subds. (a) and (c)), transmit to county clerks certified lists of candidates eligible to be voted on at primary elections (Elec. Code, Sec. 6580), issue certificates of nomination to candidates nominated and give county clerks the names of such candidates prior to a general election (Elec. Code, Secs. 6619, 6620), receive from county clerks the results of votes cast (Elec. Code, Sec. 18754), and transmit certificates of election to each person elected (Elec. Code, Sec. 18757).

(b) That respondent proposes to perform said functions, and any other functions required of him by law with respect to the election of members of the State Senate, only as to elections held within State Senate Districts established pursuant to the requirements of Section 6, Article IV of the Constitution, as amended in 1926, and Chapter 1235 of the Statutes of 1961.

(c) That, unless ordered by this Honorable Court so to do, respondent will refuse to perform any of said duties with respect to the nomination and election of members of the State Senate from Senate Districts established by a law, namely, Ch. 37, Statutes of 1911, Extra Session, which, when enacted, conformed to the senate districting requirements of the Constitution as adopted in 1879 [Exhibit "A"] and the "equal protection" guarantees of Section 1 of the Fourteenth Amendment of the United States Constitution, and will further refuse to perform any of said duties with respect to the nomination and election of said members from Senate Districts established by any law that did not conform to the senate districting requirements of Section 6 of Article IV, as amended in 1926.

X.

Petitioners allege that it would be useless for them to demand, and for that reason they have not demanded, (a) that respondent perform his duties required by law for the electing of members of the State Senate only with respect to elections held within Senate Districts that have been validly established in accordance

with principles of law espoused in this Petition and the Points and Authorities attached hereto; and (b) that he refrain from performing, under color of law, the duties of Secretary of State with respect to any election for member of the State Senate held in a Senate District established by Chapter 1235, Statutes of 1961, and that he desist from any act in aid of such an election.

XI.

Petitioners allege that there is no plain, speedy and adequate remedy provided in the ordinary course of law to compel respondent to perform his legal duty relating to elections for State Senators. The issuance of a Writ of Mandate by this Honorable Court is sought as the appropriate means provided to compel the performance of actions which the law specifically enjoins, and for the further reason that the public interest requires that at the earliest possible date the Legislature of the State of California have as one of its Houses a Senate comprised of members lawfully elected from districts established by a statute which recognizes and preserves the rights of petitioners and others similarly situated to the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the United States Constitution.

XII.

(a) Petitioners contend that, unless the Legislature first provides a senate districting statute which conforms to the requirements of both the valid provisions

of the Constitution of California and the mandate of the United States Constitution that no state shall deprive a person within its jurisdiction of the equal protection of the laws, a Writ of Mandate should direct the respondent to take such actions as are now required by law to hold elections in the Senate Districts established by the most recent valid statute enacted for that purpose under the last valid provisions of the Constitution of the State of California, namely, the districts established by Chapter 37, Statutes of 1911, Extra Session, and Article IV, Section 6, of said Constitution as it existed prior to its amendment in 1926. The reason for this contention is as follows:

Commencing with the enactment of Chapter 856, Statutes of 1927, each amendment and each repeal, reenactment or codification of California law establishing Sentate Districts was invalid to the extent that it provided for Senate Districts that conformed to the 1926 Amendment to Section 6 of Article IV of the State Constitution. The 1911 districting law, while obsolete and no longer providing districts which meet the equal protection requirements of the Fourteenth Amendment to the United States Constitution, is nevertheless a law which provides a greater measure of that equal protection of the laws guaranteed by the said Fourteenth Amendment than does the Chapter 1235 of the Statutes of 1961, and should be implemented on an interim basis at least until a new statute is enacted. Petitioners further contend that the provisions of the 1911 Statute

should be regarded as being continued in force by reason of the terms of the last sentence of Section 6 of Article IV, which reads and since 1879 has read as follows:

> ". . . Until such districting as herein provided shall be made, Senators and Assemblymen shall be elected by the districts according to the apportionment now provided by law."

(b) If the Legislature fails to adopt a valid senate districting statute, and if this Court should determine that the provisions of the 1911 Senate Districting Law are no longer in effect, petitioners contend in the alternative that a Writ of Mandate should nevertheless issue to respondent, directing him to act as more particularly set forth in the prayer to this Petition, and that the Court retain jurisdiction for the purpose of granting such further relief as may be indicated.

(c) If this Court, in the application of equitable principles, should determine that no mandate should issue which would interfere with the conduct of election processes already instituted; petitioners contend in the further alternative that the issuance of the peremptory writ should be delayed no longer than the time immediately following the completion of the election proceedings now under way.

Wherefore, Petitioners pray that a Writ of Mandate issue directed to Frank M. Jordan, Secretary of State commanding him to refrain from performing any of the duties of Secretary of State with respect to any

election for the office of member of the State Senate held within a Senate District established by Chapter 1235 of the Statutes of 1961, and that he desist from any act in aid of such an election; and that he be further commanded to perform the duties of his office relating to the election of members of the State Senate from districts established for that purpose by Chapter 37, Statutes of 1911, Extra Session, unless the Legislature adopts a new senate districting statute, conforming to the requirements of the California Constitution as it existed prior to 1926 and of the United States Constitution, in which event, respondent be commanded to perform all of his said duties with respect to the election of members of the State Senate as provided in said new law.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
City of Los Angeles,

BOURKE JONES,
Assistant City Attorney,

JAMES A. DOHERTY,
Assistant City Attorney,

Attorneys for Petitioners.

Verification.

State of California, County of Los Angeles—ss.

Samuel William Yorty, being duly sworn, says: That he is one of the petitioners in the above-entitled proceeding; that he has read the foregoing Petition for Writ of Mandate, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters, he believes it to be true.

SAMUEL WILLIAM YORTY.

Subscribed and sworn to before me this 19th day of June, 1964.

T. PAUL MOODY,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 23, 1965.

[Seal]

APPENDIX.

EXHIBIT A

See Exhibit A attached to Petition for Writ of Mandate in Yorty and Bonelli v. Jordan, Sac. 7543, p. 17.

EXHIBIT B

See Exhibit B attached to said Petition pp. 18-19.

EXHIBIT C

See Exhibit C attached to said Petition pp. 20-23.

EXHIBIT D

See Exhibit D attached to said Petition pp. 24-25.

EXHIBITS E-1, E-2, E-3

See Exhibits E-1, E-2, E-3 attached to said Petition pp. 26-30.

EXHIBIT F

See Exhibit F attached to said Petition p. 31.

EXHIBIT G

See Exhibit G attached to said Petition p. 32.

EXHIBIT H

See Exhibit H attached to said Petition pp. 33-41.

EXHIBIT I

See Exhibit I attached to said Petition p. 42.

EXHIBIT J

See Exhibit J attached to said Petition p. 43.

POINTS AND AUTHORITIES.

The Points and Authorities attached to the Petition for Writ of Mandate in *Yorty and Bonelli v. Jordan*, Sac. 7543, are referred to, and hereby adopted and incorporated by reference herein.

In addition thereto, Petitioners rely upon the following additional Points and Authorities:

I.

The California Statutory and Constitutional Provisions Under Which the State Senate Is Presently Organized Deprived Petitioners and All Others Similarly Situated of the Equal Protection of the Laws in Violation of the Fourteenth Amendment, and Are and Have Been Void Since Their Enactment.

Reynolds v. Sim, ... U. S. ...., 32 Law Week 4535;

WMCA, Inc. v. Lomenzo, ... U. S. ...., 32 Law Week 4551;

Lucas v. The Forty-Fourth General Assembly of the State of Colorado, ... U. S. ..... 32 Law Week 4557;

The Maryland Committee For Fair Representation v. Tawes, ... U. S. ..... 32 Law Week 4573;

Davis v. Mann, ... U. S. ..... 32 Law Week 4579;

Roman v. Sincock, ... U. S. ..... 32 Law Week 4583.

II.

The Fact That the California Senate Districting System Was Adopted by the Initiative, and the Fact That the People Have Declined to Change It, Is Without Federal Constitutional Significance if the System in Fact Fails to Satisfy the Requirements of the Equal Protection Clause.

Lucas v. The Forty-Fourth Assembly of the State of Colorado, ... U. S. ...., 32 Law Week 4557, 4564.

As stated in the cited case, 32 Law Week, at p. 4564, "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so."

III.

Where Equal Protection of the Laws Is Denied, It Is the Duty of Courts to Act.

In addition to the authorities cited in the Petition For Rehearing in *Vorty and Bonelli v. Jordan*, Sac. No. 7543, all of which are incorporated herein by reference, the following citations are pertinent:

". . . a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."

Reynolds v. Sim, ... U. S. ...., 32 Law Week 4535, 4544.

" . . . It is enough to say now that, once a States' legislative apportionment scheme has been found to be unconstitutional, *it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no*

further elections are conducted under the invalid plan." (Emphasis added.)

Reynolds v. Sim, ... U. S. ..., 32 Law Week 4535, 4550.

". . . While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum, *individual constitutional rights cannot be deprived, or denied judicial effectuation because of the existence of a nonjudicial remedy through which relief against alleged malapportionment, which the individual voters seek, might be achieved.*" (Emphasis added.)

Lucas v. The Forty-Fourth General Assembly of the State of Colorado, ... U. S. ..., 32 Law Week 4557, 4564.

APPENDIX B.

In the Supreme Court of the State of California.

Samuel William Yorty and Frank G. Bonelli, Petitioners, v. Frank M. Jordan, Secretary of State, Respondent. Sacramento No. 7582.

Secretary of State's Points and Authorities in Response to Petition for Writ of Mandate.

PRELIMINARY STATEMENT

Petitioners pray for a writ of mandate directed to respondent, Secretary of State,

> ". . . commanding him to refrain from performing any of the duties of Secretary of State with respect to any election for the office of member of the State Senate held within a Senate District established by Chapter 1235 of the Statutes of 1961, and that he desist from any act in aid of such an election; and that he be further commanded to perform the duties of his office relating to the election of members of the State Senate from districts established for that purpose by Chapter 37, Statutes of 1911, Extra Session, unless the Legislature adopts a new senate districting statute, conforming to the requirements of the California Constitution as it existed prior to 1926 and of the United States Constitution, in which event, respondent be commanded to perform all of his said duties with respect to the election of members of the State Senate as provided in said new law." (Petn., pp. 14-15.)

The present petition and prayer is virtually identical to one which petitioners filed on February 18, 1964, and which the court denied on March 4, 1964.* In points and authorities filed in opposition to that petition, we urged that the court decline to issue an alternative writ of mandate because, among other reasons, such a writ would disrupt the primary and general elections. We also urged dismissal because the United States Supreme Court had not provided guidelines or standards to test a state's system of apportionment against claims that it violates the Equal Protection Clause of the United States Constitution.[1]

Subsequent to the order denying that writ, the United States Supreme Court, on June 15, 1964, handed down, with opinions, six decisions in reapportionment cases which had been argued in the fall of 1963. *Reynolds v. Sims*, 32 U.S.L. Week 4535 (Ala.); *WMCA v. Lomenzo*, 32 U.S.L. Week 4551 (N.Y.); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 32 U.S.L. Week 4557; *Maryland Committee for Fair Representation v. Tawes*, 32 U.S.L. Week 4573; *Davis*

*Petitioners have filed a Notice of Appeal to the United States Supreme Court from the order of March 4, 1964, denying their previous petition. On July 3, 1964, we received a copy of petitioners' Jurisdictional Statement in the United States Supreme Court.

[1]Respondent also opposed the petitioners' prior petition on the grounds that a similar action, *Silver v. Jordan*, USDC No. 62-953-MC, was pending in the United States District Court. In view of the latest decisions of the United States Supreme Court, respondent now believes that it would be appropriate for the California Supreme Court to take and retain jurisdiction of the within petition.

v. Mann, 32 U.S.L. Week 4579 (Va.); *Roman v. Sincock*, 32 U.S.L. Week 4583 (Del.).

The following week the Court decided by per curiam orders, cases involving the apportionment of the legislatures of nine other states. *Swann v. Adams*, 32 U.S.L. Week 3441 (Fla.); *Meyers v. Thigpen*, 32 U.S.L. Week 3442 (Wash.); *Nolan v. Rhodes*, 32 U.S.L. Week 3442 (Ohio); *Williams v. Moss*, *Oklahoma Farm Bureau v. Moss*, *Baldwin v. Moss*, 32 U.S.L. Week 3442 (Okla.) *Lucas v. Adams*, 32 U.S.L Week 3442 (Fla.); *Germano v. Kerner*, 32 U.S.L. Week 3442 (Ill.); *Marshall v. Hare*, 32 U.S.L. Week 3442 (Mich.); *Hearne v. Smylie*, 32 U.S.L. Week 3442 (Idaho); *Hill v. Davis*, 32 U.S.L. Week 3442 (Iowa); *Pinney v. Butterworth*, 32 U.S.L. Week 3442 (Conn.).

The first opinion in the six decisions of June 15, 1964, is *Reynolds v. Sims*, 32 U.S.L. Week 4535. Mr. Chief Justice Warren, in the opinion of the Court, stated the new standard at page 4544:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state."

In a subsequent portion of the same opinion the Chief Justice elaborated, at page 4547:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

Three things are now clear: (1) The United States Supreme Court's construction of the Equal Protection Clause requires action with respect to the apportionment of the California Legislature; (2) wide choices are available within the standards announced by the Court, which choices should be made in the first instance by the Legislature rather than by any court; (3) interference with the 1964 election, candidates for which were nominated on June 2, 1964, is neither required nor practical.

We dispose of the last proposition first.

ARGUMENT

I

THE COURT SHOULD NOT ATTEMPT TO INTERFERE WITH THE 1964 ELECTION

Prior to *Baker v. Carr*, 369 U. S. 186 (1962), considerations such as the proximity of an election and an election procedure already in progress, were recognized as justifying a denial of relief in reapportionment cases. See concurring opinion of Mr. Justice Rutledge in *Colgrove v. Green*, 328 U.S. 549, (1946)[1] and *MacDougall v. Green*, 335 U.S. 281 (1948).[2]

This wise principle has not been discarded by the Court in its decisions since *Baker v. Carr*. In *Reynolds v. Sims*, Mr. Chief Justice Warren said:

> ". . . However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid

[2] Also see *Younger v. Jordan*, 42 Cal. 2d 757 (1954); *Green v. Jordan*, 240 Cal. 318 (1932); *Stacke v. Farquar*, 20 Cal. 2d 82 (1942).

> a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, in concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'" (32 U.S.L. Week at 4550.)

The reason advanced by respondent in opposition to the prior petition in *Vority v. Jordan*, Sac. No. 7543 continues to be valid: that equitable considerations require that the 1964 election not be interfered with. Indeed, the disruptive effects of any order affecting the 1964 election would be more severe now than last February.

The terms of office of twenty members of the Senate expire January 4, 1965. Pursuant to appropriate sections of the Elections Code, Government Code, and the Constitution, a general election is scheduled for November 3, 1964, to fill those twenty offices from *the odd numbered senate districts established by chapter 1235 of the Statutes of 1961.*[3]

As an integral part of that election process[4] a primary election was held June 2, 1964, in the districts created by said chapter 1235 of the Statutes of 1961 at which candidates of the two major political parties were nominated to run in the November election. The time required for the primary process is about five

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[3]See California Constitution, Art. IV, §§ 2-5; Govt. Code §§ 9001-02; Elec. Code §§ 23, 24, 30100.

[4]*United States v. Classic*, 313 U.S. 299 (1941); *Donnellan v. Hite*, 139 Cal.App.2d 43, 47 (1956), citing *In re McGee*, 36 Cal.2d 592, 597 (1951); and *Call v. Peterson*, 36 Cal.2d 599, 601 (1951).

months.[5] If the court alters the senate districts for the 1964 general election, it must: (1) reform or direct reformation of the California election laws; and (2) provide for their operation all within a period of about four months.

Other approaching deadlines in connection with the November 3, 1964 general election include the following:

July 11, 1964—Secretary of State issues certificates of nomination to the successful primary candidates for the office of State Senate. (Elec. Code §§ 6619, 18471, 18757.)

August 25, 1964—First day to circulate papers for independent nomination. (Elec. Code § 6864.) First day to leave independent nomination papers with County Clerk. (Elec. Code § 6833.)

September 16, 1964—Last day on which the Secretary of State shall certify to the County Clerk the name of each candidate, the office, and the party nominating him, if any. (Elec. Code §§ 6620-22.)

September 18, 1964—Last day to leave independent nomination papers and certificates appointing verification deputies in County Clerk's office. (Elec. Code §§ 6833, 6895.)

September 24, 1964—Last day for independent candidate to file his affidavit. (Elec. Code § 6920.)

September 29, 1964—Day on which County Clerk shall transmit to the Secretary of State a state-

[5]The last day for a party to qualify to participate in any primary is 135 days prior to the primary election. (Elec. Code § 6430.)

ment of the number of voters in his county at the close of registration (Sept. 10, 1964) showing the number of voters by party affiliation in each city and district, including a senatorial district, located in whole or in part within his county.[6]

[6]Within 30 days after receiving such statement, and on the basis thereof, the Secretary of State shall complete a statewide list showing the number of voters, by party affiliation, in the state and in each county, city and district, including a senatorial district in the state. (Elec. Code §§ 6460, 6461.)

October 4, 1964—Last day for Governor to issue general election proclamation which shall contain, among other things, a statement of the time of election and of the offices to be filled. (Elec. Code §§ 2601, 2602.)

October 5, 1964—First day to apply for absent voter ballots. (Elec. Code § 14621.)

October 19, 1964—Last day for County Clerk to commence to mail to each voter a sample ballot together with card or printing on the envelope designating the election and polling place in his precinct. (Elec. Code § 10012.)

October 27, 1964—Last day to apply for absent voter ballots. (Elec. Code § 14621.)

November 2, 1964—Last day County Clerk may receive ballots cast by absent voters. (Elec. Code § 14667.)

With the completion of the primary election, substantially all of the time limits for the various procedural steps relating to nominations have passed, except for those relating to independent nominations. (Elec. Code § 6800 et seq.) Yet nomination is appar-

ently essential to a candidate's right to have his name placed on the ballot. (See Elec. Code § 10200; *Narver v. Jordan*, 173 Cal. 424 (1916).)

Under the independent nomination procedure, a candidate for any public office for which no nonpartisan candidate has been nominated at any primary election, may be nominated by obtaining sufficient signatures to a petition or nomination paper subsequent to or in lieu of a primary election.

The independent nomination procedure is inappropriate and cannot effectively be utilized in lieu of the primary as a means of nominating candidates of the major political parties to run in a general election. That this procedure was never intended for such a purpose is clear not only from the very fact of the existence of the primary system, but also from the text of the applicable sections. For example, section 6830 requires each candidate or group of candidates to file a nomination paper which contains, among other things:

> "(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election."

The true purpose of these sections was summed up by the court in *Partridge v. Dercoto*, 148 Cal. 167, 170-171 (1905), where the court said of this procedure, then known as nominations by certificate:

> "The purpose of the statutory provision concerning nominations by certificate is twofold. It

> is intended, in the first place, to permit absolutely independent nominations of persons as candidates who have no political affiliations with any party, and who do not intend to form a party, but who become candidates for reasons personal to themselves or to those who sign the certificates. In the second place, it is intended to facilitate the formation of new political parties, enabling such an organization to get a place on the ballot, and if, at the ensuing election, it receives as much as three per cent of the total vote, it thereafter takes its place as a regular and recognized political party, entitled to nominate candidates by a convention."

Obviously, use of the independent nomination procedure as a substitute for the primary election would effectively eliminate the role of parties in the selection of candidates to run in the general election.

Manifestly, the writ which petitioners seek would disrupt the further progress of the 1964 electoral process, since by its very terms, the Secretary of State would be restrained from performing any of the duties of his office with respect to the election of any senator from the senate districts established by the aforementioned Statutes of 1961.

Petitioners suggest that in place of the 1961 statute, the Secretary of State be directed to perform the duties of his office relating to the election of members of the State Senate from districts established by chapter 37, Statutes of 1911, even though they contend the 1911 statute also violates the provisions of the Fourteenth Amendment to the United States Constitution.

(Petn. pp. 13, 14.)[7] Use of the 1911 statute would not solve the difficulties discussed above. The boundaries of the districts established by the 1911 statute do not coincide with those established by the Statutes of 1961. Furthermore, a comparison of the 1911 and 1961 statutes discloses that several counties, which are now included in odd numbered districts, were in even numbered districts under the 1911 statute.[8] Thus, use of the 1911 statute would result in voters and residents of some counties being denied any representation in the State Senate for at least two years.

Assuming, arguendo, that the 1961 statute is invalid, and further assuming that it is proper for the court to choose between invalid statutes, the court should choose the statute enacted pursuant to a formula which the people have approved on four occasions, rather than the formula which they rejected in 1926.[9]

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[7]Petitioners argue that the 1911 statute is continued in force by reason of the last sentence of section 6 of article IV, which reads as follows: ". . . Until such district[ing as herein provided shall be made, Senators and Assemblymen shall be elected by the districts according to the apportionment now provided by law." This argument is obviously inconsistent with their contention that the 1911 statute violates the federal Constitution. Their argument also ignores the opening clause of the last sentence of section 6 of article IV. The "districting as herein provided" is an apportionment pursuant to the provisions of section 6, as amended in 1926; and it is the Statutes of 1961, not the Statutes of 1911, which make such an apportionment.

[8]These counties are Modoc, Lassen, Shasta, Amador, Yolo and Kings.

[9]The present formula for apportionment of the Senate was adopted in 1926 by an initiative amendment of section 6 of article IV of the California Constitution. During the same election, an initiative measure was defeated which would have retained the provision of the Constitution of 1879 requiring apportionment of senatorial districts so as to preserve them "as near equal in population as may be." In 1928 a statute apportioning senatorial districts in accordance with the provisions of section 6 of article IV, as amended in 1926, was approved by

II

NO CHANGE IN THE PRESENT DISTRICTS SHOULD BE CONSIDERED BY THE COURT UNTIL AFTER THE LEGISLATURE HAS BEEN GIVEN A REASONABLE OPPORTUNITY TO ADOPT NEW LEGISLATION AT ITS NEXT REGULAR SESSION

It would seem self evident that legislative reapportionment is primarily a matter for the Legislature. Virtually every court which has been faced with a reapportionment case since *Baker v. Carr*, has recognized this fact, and state and federal courts have consistently given state legislatures a reasonable opportunity to reapportion in light of the court's general views on the subject. This practice has been sanctioned by the United States Supreme Court. In *Reynolds v. Sims*, the Supreme Court commended the federal district court for adhering to this approach, stating at page 4550:

> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to

---

the voters on referendum. In 1948 an initiative measure to reestablish population as the basis for senate representation, except that no county would have more than ten senators, was defeated by the voters. In 1960 another initiative measure to revise the present plan of senatorial districting was defeated by the voters. (Report, Study Commission on Senate Apportionment, February 1962, pp. 7-15.) In the November 1962 general election, Proposition 23, an initiative measure to modify the present method of senatorial apportionment, was also defeated by the voters. (Secretary of State, Statement of Vote for November 6, 1962 general election, p. 33.)

remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."[10]

There are a number of reasons why following this practice is peculiarly appropriate here. First, the California Legislature has not been guilty of inaction, or dilatory on reapportionment matters. Unlike the legislatures of some states, the California Legislature, since 1926, has complied with the provisions of the State Constitution requiring redistricting after each decennial census. Furthermore, the reapportionment statutes adopted by the Legislature have complied with the substantive formula established by the 1926 Amendment to the California Constitution.

The voters, whom the Legislature represents, have on four occasions refused to change the system established by the 1926 Amendment. The Legislature could not reasonably be expected to disregard the provisions of the State Constitution in the absence of a court decree that the provisions of article IV, section 6 conflict with the federal Constitution, or prior to any decision of the United States Supreme Court that

[10] Also see *Davis v. Mann*, 32 U.S.L. Week 4579, 4583 (U. S. June 15, 1964); *Roman v. Sincock*, 32 U.S.L. Week 4583, 4587 (U. S. June 15, 1964).

both houses of a state bicameral legislature must be based on population even though the voters of a state preferred a different system.

Second, while it is clear that some action may be required, it is also clear that a wide range of choice with respect to the structuring of its representative system is still left to a state. This choice should be made by those who wield legislative power, to wit: the Legislature or the People.

In the decisions of June 15, 1964, the Supreme Court observed that the problem cannot be dealt with in terms of rigid mathematical standards, and refused to spell out any precise constitutional tests.[11] However, the Court did state what it termed to be a few rather general considerations which appeared to be relevant. For example, the Court said:

> ". . . A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme."[12]

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[11] *Reynolds v. Sims*, 32 U.S.L. Week 4535, 4547-48:

". . . Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. Slaughter-House Cases, 16 Wall. 36, 78-79."

Roman v. Sincock, 32 U.S.L. Week 4583, 4587.

[12] *Reynolds v. Sims*, 32 U.S.L. Week 4535, 4548.

Another consideration justifying some deviations from population-based representation is that "of insuring some voice to political subdivisions, as political subdivisions."[13]

A determination of the size of the state's legislative bodies is within the discretion of each individual state, as is the adoption of a reasonable plan for periodic revision of its apportionment scheme.[14]

There can still be differences in the composition and complexion of the two houses of a bicameral legislature, such as single member districts in one house, and at least some multimember districts in the other house. Differences in the geographic size of the districts from which legislators are elected, are also permissible. An apportionment in one house can be arranged so as to balance off minor inequities in the representation in the other house.[15]

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[13] *Ibid.* In this connection the Court said:

". . . Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained." (p. 4548.)

[14] *Id.*, pp. 4548, 4549.

[15] *Id.*, p. 4547. However, the Court warned that,

". . . neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most

Third, the task of reshaping the districts will be extremely complex because of the large number of counties in California and the irregular distribution of population throughout the State. For example, based on the 1960 census, the population of only 10 of the 58 counties equal or exceed what petitioners would describe as an "ideal" senate district population of 392,930.[18] Within those 10 counties reside 76% of the State's total population. These 10 counties occupy but 21.38% of the total land area of the State. Redistricting will require examination and study more appropriate to the legislative process than the judicial process.

In this connection, it should be noted that petitioners do not ask the court to itself draft a districting plan. They ask only that the court order use of the 1911 statutes until the Legislature has enacted reapportionment legislation which complies with the requirements of article IV, section 6 prior to its amendment in 1926, and the Fourteenth Amendment. But, as previously noted, the 1911 statute must be rejected.

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claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." (p. 4548.)

[18]This theoretical figure is arrived at by dividing the total population of the State by the total number of members of the State Senate.

CONCLUSION

Respondent respectfully submits that no change in the present districts should be considered by the court at this time. The Legislature of California should be given an opportunity to consider and adopt reapportionment legislation in its next regular session, which commences on January 4, 1965. Thus, the court will avoid disrupting the 1964 election, and will impose responsibility for redistricting on that body which is best equipped to deal with the problem. Any present action by the court should be limited to retention of jurisdiction to be exercised only after the 1964 election, if the Legislature fails to initiate or take action which may be required in order to conform in good faith to the United States Supreme Court's decisions of June 15 and 22, 1964.

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IN THE.

Supreme Court of the United States

October Term, 1964.
No. 250

SAMUEL WILLIAM YORTY and FRANK G. BONELLI,
Appellants,

vs.

FRANK M. JORDAN, Secretary of State,
Appellee.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS.

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APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS.

ARGUMENT.

When reduced to its essentials the Appellee's Motion to Dismiss is recognizable as an imaginatively conceived but ill-disguised dilatory plea. Because of an action taken by the California Supreme Court on July 30 (discussed in Point I below), its dilatory character is even more apparent now than it was when originally proposed and filed. When the grave and pressing issues of legislative apportionment and the integrity of the individual's right to vote are presented, purely dilatory motions should not prevail.

Each argument put forward by Appellee can and will be refuted.

I.

A Recent Development in California Legislative Apportionment Litigation.

The Notice of Appeal in the within proceeding was filed prior to the decision on June 15, 1964, of the Reapportionment Cases; the Jurisdictional Statement was docketed July 6, 1964.

Between these two dates, on June 19, 1964, Appellants filed another Petition for Writ of Mandate with the Supreme Court of California (*Yorty & Bonelli v. Jordan*, Sacramento No. 7582) which was substantially identical with that involved in the present appeal. (A copy of that Petition is attached to Appellee's Motion to Dismiss as its Appendix A.) Appellee, appearing as respondent, advised the California Supreme Court that it would be appropriate for it to take and retain jurisdiction of the new proceeding, but that present action should be limited to retaining jurisdiction to be exercised only if the Legislature fails to take appropriate action. (Motion to Dismiss, Appendix B, p. 2, footnote 1, and p. 17.)

On July 30, 1964, the Supreme Court of California, made the following Minute Order:

"Sac. No. 7582

"In the Supreme Court of the State of
California in Bank
Yorty et al.
v.
Jordan, Secretary of State.

The petition to intervene and the petition for the writ of mandate are denied for the reason that any determination by this court on the ques-

tion of legislative reapportionment would be premature until such time as the Legislature has had an opportunity to consider the matter and to take such action as it may deem to be required pursuant to the expression of the United States Supreme Court in Reynolds v. Sims, 32 U.S.L.W. 4535, and companion cases.

/s/ Gibson
Chief Justice"

In view of the above, the argument of Appellee (Motion to Dismiss, p. 15) that this appeal should be dismissed because of the pendency of the second action in the California Supreme Court is no longer of any force.

The history of legislative apportionment in California is one of consistent and persistent disregard of the rights of the populous areas of the State to adequate representation in the State Senate. Three relatively modest reapportionment initiatives have been turned down at the polls (1948, 1960 and 1962), and the Legislature has on at least three occasions (1951, 1955, and 1957) failed to adopt reapportionment measures granting even slight relief to the citizens of populous counties (Jurisdictional Statement, pp. 6-9; Report of the State of California Study Commission on Senate Apportionment, published February 1962, pp. 11-15). According to press reports, members of the California Legislature are actively and personally urging the Congress to take precipitate action to nullify insofar as possible the effect of the Reapportionment Cases. In view of past history and present attitudes, there is scant if any hope that the California Legislature, in the absence of judicial mandate, can be

expected to initiate the dissolution of the long-treasured prerogatives of its upper house. The quoted Minute Order from the California Supreme Court can therefore be read as virtually assuring even further delay unless the appeal herein results in a prompt decision on the merits.

Surely neither the quoted Minute Order nor the order appealed from can be reconciled with the holding of this Court that "the basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (*Watson v. City of Memphis*, 373 U. S. 526, 533.) Nor can they be harmonized with the statement: "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." (*Reynolds v. Sims*, ... U. S. ...., 84 S. Ct. 1362, 1384.) Indeed, neither the quoted Minute Order nor the order appealed from can stand against the directive that "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." (*Reynolds v. Sims, supra*, U. S. ...., 84 S. Ct., 1393-1394.) Further, the presence of equitable considerations, while they may justify withholding *immediately effective* relief, do not justify the actions of the California Court which in legal effect amounted to a dismissal of the case (*Reynolds v. Sims, supra* .... U. S. ...., 84 S. Ct., 1394.)

II.

Not One of the Suggested Non-Federal Grounds for the State Court's Action Is Adequate to Support That Action.

A. No Substantial or Sufficient Non-Federal Ground Appears in the Petition.

The Supreme Court of California filed no opinion in the matter appealed from. The reason for its summary denial, whether it be the same or different from the quoted Minute Order of July 30, can only be surmised. It is clear, however, that no substantial or sufficient non-federal ground can be found in the Petition itself.

It will be recalled that the basic issue presented to the Supreme Court of California was the claim that the Senate districting laws of the State invidiously discriminated against the appellants and deprived them of the equal protection of the laws. (Jurisdictional Statement, p. 4.) This was unquestionably a Federal issue, and the issue upon which all else turned. The only non-federal question presented in the Petition related to one alternate and severable portion of the relief prayed for: Should the Court, in the event of refusal of the Legislature to enact a new and valid districting law, order future elections for members of the California State Senate to be held in districts established under the last validly enacted senate districting statute (Calif. Stats. 1911, Extra Session, Ch. 37)? A favorable decision on the Federal question was a condition precedent to, and in no way dependent upon, any possible decision as to what kind of relief should be granted by the State Court under State law. The decision of the California Supreme Court, therefore, could

not have rested solely upon any non-federal question presented to it in the pleadings, for the non-federal question would never be before the California Court for decision unless it had first decided the Federal question in accordance with the contentions of the appellants.

In a case where the petition on its face establishes the deprivation of a Federal right, the denial of the petition without opinion strongly suggests that there was, in the view of the State court, no cause of action based on the Federal right. Where an examination of the record shows no substantial or sufficient state ground for the denial, it will be presumed that the state court based its judgment on the law raising the Federal question.

Williams v. Kaiser, 323 U. S. 471, 478;
Klinger v. Missouri, 13 Wall. 257, 263;
Maguire v. Tyler, 8 Wall. 650, 665.

B. No Substantial or Sufficient Non-Federal Ground Is Suggested in the Motion to Dismiss.

(1). Contrary to Appellee's contention (Motion to Dismiss, p. 7), issuance of a writ of mandate would not necessarily disrupt election processes under way. The issuance of the writ could decide the merits of the case, but would not result in a disruption of the elective process unless the writ also granted immediately effective relief. The California Supreme Court in a recent county redistricting case has made use of the device of deciding the merits first and retaining jurisdiction for the purpose of moulding appropriate relief. (*Griffin v. Board of Supervisors*, 60 Cal. 2d 318, 384 P. 2d 421.) It has been held that equitable considera-

tions might withhold "the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.", (*Reynolds v. Sims, supra*, ... U. S. ..., 84 S. Ct., 1394.) The possibility of disrupting the election in process, therefore, was a matter within the California court's own control. It is not a substantial or sufficient non-federal ground upon which the State court's action in refusing to take jurisdiction could have been based. The refusal to take jurisdiction necessarily involved passing on the Federal question involved.

(2) Appellee's argument (Motion to Dismiss, p. 7) that appellants are estopped to press for a reapportionment in the midst of a pending election because they waited six months in commencing their proceeding is not supported by any citation to authority. First of all, Appellants did not limit their prayer for relief to a single election, whether in process or not; the Petition is obviously aimed at all future elections called under the discriminatory statute. Secondly, it is difficult to conceive how any equitable considerations would operate to estop a citizen from asserting at any time the fact that each day a discriminatory law is enforced against him he is being deprived anew of the equal protection of the laws. In any event, the power which the court retained to control the timing of the relief to which appellants are entitled, as further explained in (1), *supra*, makes this supposed non-federal ground for the State court's action both unsubstantial and clearly insufficient.

(3) Appellee's argument (Motion to Dismiss, pp. 7-8) that the pendency of an action in the United States District Court for the Southern District of

California may have supplied a possible non-federal ground for the California Supreme Court's action is insufficient under California law and therefore could not be a sufficient explanation of the California Courts' action. The California Supreme Court has held that the plea of "another action pending" is a plea in abatement and is not favored; that where the matters presented are of great importance, such as statewide elections and statewide affairs, and where the rights to be protected should not be allowed to bog down in litigation, the court should, as a matter of public policy, deny what amounts to a plea in abatement, exercise its original jurisdiction to issue writs of mandamus and make a determination of the question. (*Perry v. Jordan*, 34 Cal. 2d 87, 90-91, 207 P. 2d 47.) In any event, the plea of "another action pending" is not well founded in California practice unless the parties to the two actions are the same. (*Perry v. Jordan, supra*, p. 90.) From the Motion to Dismiss it expressly appears that the parties to the action before the United States District Court are not the same as the parties to the within proceeding. The supposed non-federal ground, being contrary to the State court's own decisions, is clearly an unsubstantial and insufficient basis for the action.

(4) Appellee's argument (Motion to Dismiss, p. 8) that the State court might have acted as it did because it was unable to predict the constitutional standards ultimately decided by this Court in its decisions of June 15 is reminiscent of the majority opinion in *Hearne v. Smylie*, 225 F. Supp. 645 (D.C. Idaho, 1964), which was reversed and sent back for further proceedings by this Court on June 22, 1964 (.... U. S. ...., 84 S. Ct.

1917). The assumption of judicial timidity or indecision suggested by appellee, while unquestionably pure speculation, certainly cannot be regarded as a substantial and sufficient non-federal ground for the State court's action, particularly in view of the determination by this Court that "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." (*Reynolds v. Sims, supra*, ... U. S. ...., 84 S. Ct., 1384.)

(5) When the Motion to Dismiss, at page 8, describes the Petition for Writ of Mandate as asking relief which "concededly fails to meet constitutional standards", appellee misunderstands or misstates the meaning of the Petition. The relief requested was in two parts. The first request was to require that the Secretary of State perform no functions with respect to calling elections under the invidiously discriminatory law. There is nothing unconstitutional about granting that kind of relief. The second request was to require that future elections be called under the last validly enacted senate districting law (which is admittedly obsolete, but nevertheless far more equitable than the law under which California law now operates) until the Legislature enacts a valid law. There is nothing unconstitutional about that. This Court approved the action of the Alabama District Court in providing a provisional method of legislative districting pending action by the State Legislature. (*Reynolds v. Sims, supra*, ... U. S. ..., 84 S. Ct., 1394.) It is a characteristic of equitable proceedings that remedies can be tailored to circumstances. *Brown v. Board of Education*, 349 U. S. 294, 300; *Alexander v. Hillman*, 296 U. S. 222, 239.

(6) The California Supreme Court has itself refuted the point made by appellee (Motion to Dismiss, pp. 8-9) that the Supreme Court is not the appropriate place in which to seek relief. First, in *Perry v. Jordan*, 34 Cal. 2d 87, 90-91, 207 P. 2d 47, the Supreme Court of California has stated that it *should* exercise its power to issue writs of mandamus in important cases such as those involving statewide elections. Secondly, in the case of *Yorty and Bonelli v. Anderson*, 60 Cal. 2d 312, 317, 384 P. 2d 417, the California Supreme Court expressly advised appellants that the proper method of raising their point was through filing a petition for writ of mandamus, and citing as authority the following three cases, in each of which the California Supreme Court took original jurisdiction: *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P. 2d 787; *French v. Jordan*, 28 Cal. 2d 765, 172 P. 2d 46; and *Gage v. Jordan*, 23 Cal. 2d 794, 147 P. 2d 387.

It is true that none of these cases asked the Supreme Court to redistrict the State of California. But appellants do not ask the California Supreme Court to redistrict the State, although the California Court had no difficulty in ordering redistricting a county (*Griffin v. Board of Supervisors*, 60 Cal. 2d 318, 384 P. 2d 421). Appellants ask that the chief election officer of the State perform his duties only with respect to valid laws, and that he be required to disregard what appellee now concedes to be invalid laws. There is no action required of the court which cannot be readily handled by the Supreme Court of California as a matter within its original jurisdiction.

This argument of appellee, therefore, could not have been one that influenced the California Supreme Court,

for the argument is contrary to the Court's own opinions and assumes, contrary to fact, that the California court would be called upon to reapportion the State. There is no substantial or sufficient non-federal ground present in this purely hypothetical argument.

(7) The argument (Motion to Dismiss, p. 9) that the State court could have taken the view that no relief was appropriate until the Legislature had an opportunity to act in the light of anticipated decisions in the Reapportionment Cases then under submission before this Honorable Court misses the distinction pointed out in *Reynolds v. Sims, supra,* .... U. S. ...., 84 S. Ct., 1394, between *deciding* the case and the application of equitable principles in determining *whether immediately effective relief* should be granted. Where matters as important as the right to vote are the issue, the basic guarantees of the Constitution are warrants for the here and now. (*Watson v. City of Memphis*, 373 U. S. 526, 533.) Ever since the decision in *Baker v. Carr*, 369 U. S. 186, there has been no question but that the California senate districting system denied the equal protection of the laws to residents of the populous California counties. The question of what degree of change was required may have been in doubt until June 15, 1964; but that some major degree of change was necessary was clear, and no substantial or sufficient non-federal ground can explain the State court's action in failing to decide that issue.

In truth and fact, the issue before the California Supreme Court was a Federal issue. It could not even consider the case without considering the Federal issue. Suggestions that adequate State grounds existed to explain the State court's action are unsubstantial at best and speculative assumptions in any event.

III.

Appellants Have Met the Burden of Showing That the Action of the California Supreme Court Rested on a Federal Ground Insofar as That Can Be Done in a Case Where No Decision Was Filed in the State Court.

Appellee, in Point II of its Motion to Dismiss (pp. 9-14) correctly cites cases in support of the quoted principles of law, but appellee is mistaken as to the applicable principles.

This is not the usual case where both federal and non-federal questions have been raised in the State court, and where the decision might have been based on the non-federal ground. As pointed out in Point II-A of this brief, the only non-federal issue raised in the Petition was an alternate and severable part of the prayer for relief, and this issue by its nature, would never be reached by the State court unless it had first decided the Federal questions favorably to appellants' contentions.

Insofar as appellants' meeting the requirement of affirmatively showing that the California court passed upon the Federal question, it is submitted that the following is a correct statement of the applicable rule in this case:

> "... it is ... well settled that if the independent [non-federal] ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' [citations omitted.] Thus in Maguire v. Tyler, 8 Wall. (U.S.) 650, 19 L. ed 320,

and in Neilson v. Lagow, 12 How. (U.S.) 98, 110, 13 L. ed 909, 914, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases is applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. . . . We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. That seems to us to be the fair intendment of the language which it used if we put to one side, as we must, the insubstantial state grounds which have been advanced in explanation of the denial."

Williams v. Kaiser, 323 U. S. 471, 478-479.

The fact that, under California law, summary refusal of a court to issue a writ of mandate is not an adjudication on the merits (Motion to Dismiss, p. 11) does not make the court's action any less final in the sense of 28 U. S. C. 1257. The correct statement of the rule requiring finality is as follows:

"Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an

> effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."
>
> *Market Street Ry. Co. v. Railroad Commission*, 324 U. S. 548, 551.

It is clear that the action of the Supreme Court of California in denying the Petition for Writ of Mandate in the present proceeding is a final and complete disposition of that case so far as the State court is concerned. The fact that the action appealed from is not an adjudication of the merits of the case does not detract from the fact that the action is subject to no further review by a State court and is a complete disposition of that particular case.

When appellee contends that the issuance of an alternative writ of mandate is a matter within the discretion of the California courts, and governed by equitable principles (Motion to Dismiss, pp. 12-13), the statement is correct as a matter of the California law. But, as determined by California cases, where the equitable considerations are those surrounding important cases, such as those affecting statewide elections, and those affecting practically every citizen of the State, "proper public policy demands that this court entertain these proceedings." (*Perry v. Jordan*, 34 Cal. 2d 87, 91, 207 P. 2d 47.) Indeed, where equal protection of the laws is at issue, the right of a lower court to exercise its discretion by refusing to take prompt protective action has been frowned upon. (*Sweatt v. Painter*, 339 U. S. 629; *Sipuel v. Board of Regents*, 332 U. S. 631.) Where basic constitutional guarantees are the issue, equitable considerations should com-

pel the court to act rather than give it the discretion to withhold action for unexplained or unsubstantial reasons. As stated in *Watson v. City of Memphis*, 373 U. S. 526, 533:

> ". . . The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."

The fact that the civil rights discussed in the *Watson* case did not include the right to vote does not detract from the force of the statement of equitable policy. Discretion of a court is abused if it withholds its protection for insufficient reasons where constitutional rights are at stake.

Appellee (Motion to Dismiss, p. 14) states that he does not challenge the jurisdiction of the California court to act after the completion of the 1964 election. This, when taken in connection with statements on pp. B2 and B17 of the Motion to Dismiss, is an apparent concession as to the merits of appellants' cause. His only plea remaining is that 1964 elections should not be disrupted. But appellants did not base their cause of action on the pendency of a single election. Unless the relief prayed for is granted, not only the 1964 elections will be held under the invalid statute, but also the elections of 1966, 1968 and 1970. If it should be too late, or too disruptive, to grant immediately effective relief for the 1964 election, for what reason can the Court fail to provide judicial protection

for the elections which follow? For what reason can a petition seeking relief as to all future elections be denied in its entirety for the reason that it would be inconvenient to grant relief as to the first election?

It is submitted that the appellee's argument is based upon a misreading of the true nature of the petition, or it attributes to the California Supreme Court a totally inadequate non-federal ground as explanation of its failure to act.

Conclusion.

It is respectfully submitted that the Motion to Dismiss should be denied. Not only has the appellee wholly failed to suggest a single substantial and sufficient non-federal ground as the basis for the California court's summary denial of the Petition for Writ of Mandate, but the appellee has for practical purposes conceded that the appeal is meritorious in all respects except timing. The objection to timing has now been largely dispelled by reason of the fact that the California Supreme Court, on July 30, refused to entertain the new action brought by the appellants on June 19, 1964, and has indicated that it will be unavailing to bring any action for this purpose in a State court until the adjournment of the forthcoming session of the California Legislature. This will occur on or about June 11, 1965. It is submitted that this is an unreasonable delay in the adjudication of appellants rights, and a procedure which will in fact encourage the Legislature to extend the delay even further if possible.

The appeal should be granted and the matter referred back to the Supreme Court of California for further proceedings in accordance with the rulings in the Reapportionment Cases decided on June 15, 1964. Early decision on the merits is required so that Legislative relief will be promptly granted and not allowed to become bogged down in a miasma of dilatory maneuvering.

Respectfully submitted,

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